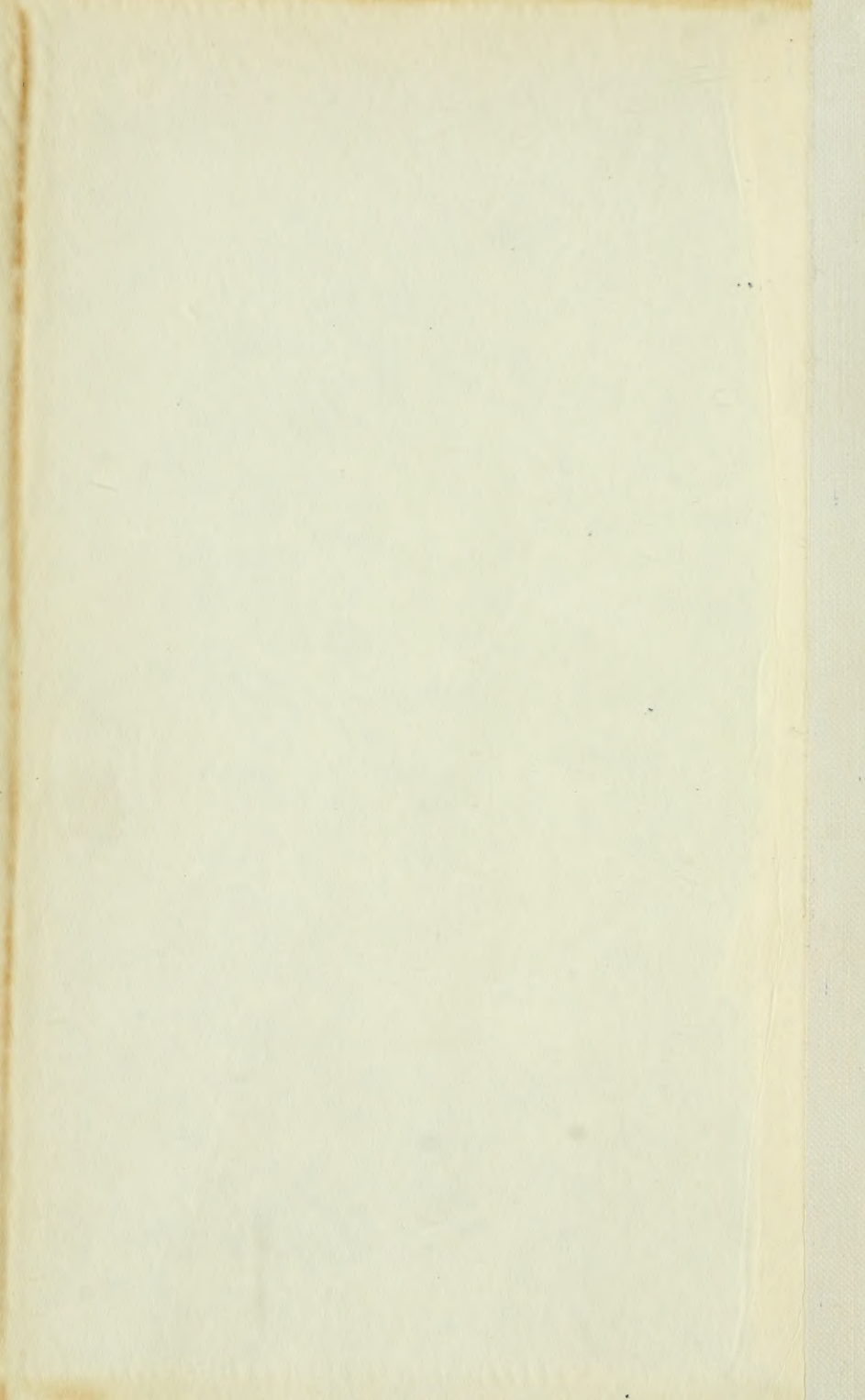




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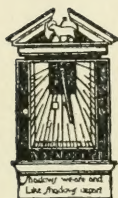
INTERNATIONAL LAW

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# INTERNATIONAL LAW

BY  
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FIFTH EDITION  
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*I dedicate the fifth edition of this work to the memory of my father, Frederick Smith, who fought with distinction, as a non-commissioned officer, in the battles of his country, and afterwards commenced a career of singular promise at the bar, which was unhappily terminated by his premature death at the age of forty-three.*

F. S.

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## PREFACE TO THE FIFTH EDITION

THE history of this book has been somewhat curious. It began its existence as a volume in Dent's Primer Series in 1899. I wrote it in the first year of my practice at the Bar while I was still waiting for briefs. New editions were called for in 1902 and 1906. Between 1906 and 1912 there were several reprints; and in the last-named year the publishers asked me to enlarge the book for the purpose of a new edition in order that it might become a companion volume to the late Lord Courtney's volume upon the English Constitution.

I was not able to carry out this task myself, but the duties of editorship were undertaken by Mr. James Wylie, Barrister-at-law, a distinguished member of Wadham College, to whose scholarship and industry the fourth edition owed much of its success. I was, of course, consulted upon all the additions to the original book; I made some of them myself; and I retained responsibility for the opinions expressed.

Since the outbreak of war Mr. Wylie has been continuously engaged at the Treasury in Prize matters; and he was therefore unable to undertake the task of editing the fifth edition. The publishers have been most fortunate, however, in securing the services of Dr. Coleman Phillipson as editor. Dr. Phillipson is generally recognised as one of the greatest living authorities upon the subject of International Law, and he has, in my judgment, shown equal skill and learning in the task of bringing the present edition up to date without unduly increasing its bulk, or sacrificing such distinctive character as the work possessed. The volume has, of course, grown; but this was

inevitable, having regard to the number of prodigious events vitally affecting the doctrines of International Law which have happened since August, 1914. Such of these events as could, in reasonable perspective, be included have received consideration in the following pages. As my share has been mainly consultative I may perhaps express the belief that their treatment will be found to be both judicious and suggestive.

An attempt has been made to keep abreast of the immense volume of decisions which have been given in the Prize Court during the War. In this part of the work the evident necessity of severe compression has made a complete treatment of the subject impossible. It is, however, hoped that the references contained in this portion of the work will be of interest to the general reader, and may even be useful, as a starting point, to the practitioner.

And here I may be allowed to add my voice to those who have pointed out how irreparable a loss the Empire has sustained in the loss of my friend Sir Samuel Evans. I know of no one living who can quite adequately fill his place. Quick, thorough, brilliant and industrious, he had a profound intuition of the foundations upon which our maritime greatness depends; and no judge upon the Bench was better equipped with the juridical learning which is its proper and necessary soil. I am sure of one thing: that his name will live in history side by side with that of Lord Stowell whose learning (at the end) he almost rivalled, whose patriotism he equalled, and whose ingenuity he excelled. Whoever takes his place will water what the late President planted.

It may appear to some that the present moment was hardly opportune for a new edition of a work upon International Law. I do not share that view. It is true that the authority of this body of public doctrine has for four years reeled before a savage, calculated, and almost successful assault. It is true that an immensely powerful and highly educated nation has challenged

the whole world by its repudiation of Public Law. It is true that the Kaiser, out-Bismarcking Bismarck, has alleged that International Law is dead. It is true that had victory, in the final result, settled upon the standards of Germany, we could have burned our Grotius, our Vattel, our Phillimore, our Wheaton, and our Hall. But in ever increasing numbers the world is ranging itself against the international anarchist. The audience watching the arena in which his crimes are displayed grows more and more hostile. And more and more, too, the logic of the stricken field is asserting its cold and merciless conclusions. The tragedy has been long, and the agony of the world has passed imagination. But to-day it is moving to its close with the terrifying inevitableness of which, in ancient tragic literature, Æschylus almost alone was the master. And to-day there must be sounding in the ears of the guilty the dreadful words of Failure and of Doom.

And it should never be forgotten that Failure must involve Doom. The future of civilisation requires that the authority of Public Law shall be reasserted with as much notoriety as marked the challenge; and it cannot be so reasserted without requiring from those who sought to destroy it a punishment so memorable, because so dreadful, that the offence will not soon be repeated.

For the correction of specific infamies International Law does not exclude the castigation of guilty individuals, however highly placed.

Material injuries may be made good by the payment of pecuniary indemnity. And if it be objected that an impoverished nation has no money wherewith to make good the consequences of its crimes, it may be answered that the claims of a guilty nation to be repaid interest on the money it supplied, for the purpose of those crimes, may be justly postponed to the complaints of the victims.

German policy publicly announced that it left to the



vanquished nothing but eyes with which to weep. We, on our part, may more moderately announce that we leave them all that is not necessary to make the most complete compensation for the wrongs of which they have been guilty. And it may, in conclusion, be pointed out that the ordinary assumption that the Central Powers will be represented, in the sense that the Allies are, at the Peace Conference would seem to require very considerable qualification. They should be present in the later scenes to hear, but not to contribute to, the discussions of the Allies. If recent precedent is required for this view it may be found in the rôle which the Bolshevik and Rumanian representatives were recently allowed to play at the respective negotiations in which they, too, listened to decisions.

And if there be any one who, after four years of war, feels dawning in his mind any sentiment of pity for a Power which has never known, in its arrogant triumphs, the meaning of compassion, or been moved by the conception of mercy, let him read and re-read the story of Bismarck's 'negotiations' with Favre nearly fifty years ago. The French appeal was moving and even plangent; but the eyes of the Prussian were hard and dry.

The British Empire is very patient, and very slow in forming tenacious resentments; but I wholly misread the temper and the minds of my countrymen if they are not implacably resolved that the guilty shall pay for their crimes to the uttermost ounce in their bodies and in their purses. And the doctrines of International Law afford abundant warrant and precedent for both these demands.

FREDERICK SMITH.

ATTORNEY-GENERAL'S CHAMBERS,  
*September 18, 1918.*

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# INTERNATIONAL LAW

## INTRODUCTORY CHAPTER

### NATURE OF INTERNATIONAL LAW

By international law is meant the rules acknowledged by the general body of civilised independent states to be binding upon them in their mutual relations. Definition.

In a form more or less rudimentary we may suppose such rules to have existed almost from the infancy of society, for national isolation or recognition of international rights and duties must always have been necessary alternatives. Development of international law. Small indeed was the area covered by these rough-and-ready conventions, and when a new rule was added to the code, it sprang from the imperious promptings of mutual convenience or mutual safety. The sanctity conceded by ancient sentiment to the office of herald supplies a well-known instance of this class of rules. The duty of respect to this office is insisted on in the Homeric poems, and when the people of Ammon sent back David's ambassadors <sup>1</sup> without one side of their beards, it was felt that the limits of international outrage had been reached. We must not trace in the immunity of envoys the germs of a nascent humanity: it was an immunity involved in the necessity of international intercourse. Outrages would naturally have been followed by reprisals, until the calling of a herald gradually ceased to attract. The constitution of ancient societies was little favourable to the development of a systematic body of rules. Since states are its units, international law can only exist where a number of communities acknowledge a mutual equality before the law and make common submission to its authority.

Such conditions did not prevail amongst the nations of antiquity in general. There was a recognition of certain rules and customs as between peoples of cognate race; the obligation to observe them in regard to those outside the pale was either not admitted or much less stringent. For the most part a state of hostility characterised the relationships between a nation and alien races. Might was regarded as right. Neither person nor property was considered sacred. War was waged

<sup>1</sup> 2 Samuel x, 4.

with extreme ferocity. The conqueror frequently resorted to indiscriminate slaughter, destruction, and devastation; captives were subjected to atrocious treatment: mutilation, burning alive, enslavement. Plutarch makes Brennus, chief of the Gauls, say to the Roman ambassadors who intervened on behalf of the Christians: 'Upon these [mentioning various peoples] you make war; if they refuse to share with you their goods, you enslave their persons, lay waste their country, and demolish their cities. Nor are your proceedings dishonourable or unjust; for you follow the most ancient of laws, which directs the weak to obey the strong.'<sup>1</sup>

But such practice was neither universal nor consistent; there were here and there notable relaxations in practice and acceptance of humaner principles in theory. Thus the laws of *Deuteronomy* imposed restrictions on devastation;<sup>2</sup> in ancient India the *Ordinances of Manu* (c. 500 B.C.) contained rules inspired by humanity and even chivalry. In time of peace numerous rules were recognised in regard to embassies, treaty-making, the establishment of alliances, submission to arbitration, and other international transactions. Nowhere did these amount to anything like a regular body of international law; but in Greece and Rome we find the development of a rudimentary system of interstate jurisprudence.<sup>3</sup>

Greece.

In ancient Greece a distinction was drawn between the Hellenic circle and the states outside it. Non-Hellenes were designated barbarians, who, in Aristotle's view, were destined by nature to be the slaves of the Greeks.<sup>4</sup> At the assembly of the Ætolians an envoy of Philip is reported by Livy to have said: 'With foreigners, with barbarians, all Greeks have and ever will have eternal war.'<sup>5</sup> Such antagonism to people beyond the pale was universal in ancient times: each race proclaimed itself the 'chosen' race. But different sentiments were not infrequently expressed, and even applied in practice. However this may be, in the Greek city-state system various principles came to be recognised as applicable to interstate transactions; and these principles, relating to a number of autonomous and independent communities—small though they were—constituted a body of Hellenic public law, which merited the name of international law as much as, say, modern European public law merits it. In the Greek writers

<sup>1</sup> Plutarch, *Life of Camillus* (Langhorne's trans.).

<sup>2</sup> *Deut.* xx, 10-20.

<sup>3</sup> Cf. C. Phillipson, *International Law and Custom of Ancient Greece and Rome*, 2 vols. (London, 1911).

<sup>4</sup> *Polit.* i, 1, 5.

<sup>5</sup> Livy, xxxi, 27.

we constantly meet with such expressions as τὰ τῶν Ἑλλήνων νόμιμα (the laws of the Hellenes), τὰ κοινὰ τῶν Ἑλλήνων νόμιμα (the common laws of the Hellenes), κοινὰ δίκαια τῆς Ἑλλάδος (the common rights of Hellas), and the like. No doubt these νόμιμα were consolidated by pride in Hellenic nationality and the abhorrence of savage practice, but the Greek mind with all its immense intellectual subtlety was never a legal mind; the area over which the interstate customs extended was curiously partial and arbitrary, and the sanction on which they uncertainly depended was really the sentiment of *noblesse oblige*.

Notwithstanding this deficiency and the absence of a regular, systematic body of international law in Greece, we find there many elements that are closely akin to those of the modern law of nations. Apart from certain rules relating to private international law, naturalisation, aliens, and consuls, there were rules of public international law in time of peace concerning hospitality, asylum, extradition, ambassadors, diplomatic negotiation, treaties and alliances, balance of power and right of intervention, arbitration; in time of war, concerning sufficient causes of war, declaration of war, truce and armistice, ransom of prisoners, spies, hostages, reprisals, a certain neutralisation, various mitigations of warfare, neutrality, maritime jurisdiction, embargo, blockade, piracy, etc.<sup>1</sup>

The history of ancient Rome reveals an advance on the theory and practice of Greece. That the Romans were the greatest law-makers and law-givers of antiquity is a fact that has now become a commonplace. Their juridical spirit was manifested in a great variety of international transactions. Notably in the earlier part of her history, Rome recognised the existence of sovereign and independent states other than her own; she had a clear conception of a *civitas gentium* (society of nations), and admitted the principle of reciprocity. Her career of war and conquest did not make the existence of rules of international law impossible. Her *jus fetiale* comprised a body of principles relating to war and diplomacy, the observance of which was ensured by powerful sanctions. Modern writers have too frequently been misled, in drawing their conclusions, by casual remarks met with in the classical authors, e.g. 'ubi solitudinem faciunt, pacem appellant' in Tacitus, 'debellare superbos' in Virgil; or by such statements as 'adversus hostem aeterna auctoritas esto' in the XII Tables.

<sup>1</sup> All these questions are elaborately dealt with by Phillipson, *op. cit.*, who furnishes abundant evidence from ancient records, classical and epigraphic.



The law of force was not by any means the only dispensation. That international law was in the hands of the Romans distinctly progressive is shown by the numerous provisions and institutions relating to a great variety of international relationships: alliances, arbitration, the tribunal of recuperators; *hospitium publicum*, naturalisation, extradition, immunity of ambassadors, procedure and formalities in the conclusion of treaties, conception of protectorates and territorial sovereignty; declaration of war and regular formalities connected therewith, right of asylum, sanction of pledged faith in peace or war, granting of safe-conducts, regulation of the treatment of the conquered enemy and captured property, the burial of the dead, truces, armistices, ransom and exchange of prisoners, the doctrine of postliminium, the position of hostages. In the later period of the history of Rome many of these provisions, especially those comprised in the fetial law, were frequently disregarded; but this does not destroy the fact that they had been developed by the Romans, and at certain periods pretty consistently applied by them in a legal spirit. The system—rudimentary as it was—left by Rome contributed not a little to the foundations of modern international law.<sup>1</sup>

Modern international law.

The analogies furnished by ancient society cannot be pursued further here; we pass hurriedly on, therefore, to the development of the modern law of nations.<sup>2</sup> The opportunity came with the break-up of the Roman empire into independent states, but a period of darkness immediately followed, little favourable to the evolution of legal principles. Alike in Eastern and Western Europe men were waging desperate wars, the bloody records of which were to be the authorities of Ayala and Gentilis.<sup>3</sup> These two writers appeared almost together towards the close of the sixteenth century; their views are often confused and sometimes absurd; they are deficient alike in the sense of proportion, and the faculty of discrimination, but their publications none the less mark an immense advance in international morality. Now for the first time it was boldly affirmed that the conduct of states should be controlled by legal rules. The code was a ruthless one, but the alternative was complete lawlessness. Immeasurably greater than these

<sup>1</sup> See Phillipson, *op. cit.*, *passim*.

<sup>2</sup> For a convenient historical outline, see H. Wheaton, *History of the Law of Nations* (New York, 1845); T. A. Walker, *History of the Law of Nations* (Cambridge, 1899).

<sup>3</sup> For an article on Gentilis by C. Phillipson, including an analysis and estimate of his work, see *Great Jurists of the World* (London, 1913), pp. 109-143.

two writers on the constructive and critical side was their successor, Hugo Grotius,<sup>1</sup> who was born in 1583, the year after Ayala's work was published. It would be hard to mention any writer in any field of literature who has more profoundly influenced the course of human history. Grotius was not a narrow specialist. Law, theology, politics, scholarship—all at different times engaged his marvellously facile pen; but the publication of his famous work, *De Jure Belli et Pacis* (1625), showed that a clear and original thinker was devoting his great intellect and unrivalled learning to the infant science of international law. It may be imagined that Grotius and his predecessors did not find ready-made the principles on which their science was to rest. No doubt there were precedents, but they were mostly of a kind to be evaded, and a treatise on international law, which derived its rules of war from the belligerent records of the preceding centuries, would have been a qualified blessing to humanity.

The labours of Ayala, of Gentilis, and of Grotius could never have produced results so great had they not been associated with a conception which has, perhaps, caused more loose thinking than any other in the history of thought—that of the law of nature. In its origin this phrase denoted simply those universally received rules of morality which deal with the external actions of men.<sup>2</sup> In this sense the occasional

Law of  
nature.

<sup>1</sup> See *Great Jurists of the World*, pp. 169-185 (article by Sir W. Rattigan); A. White, *Seven Great Statesmen*, etc. (New York, 1910), pp. 54-110.

<sup>2</sup> Cf. Sir T. E. Holland, *Elements of Jurisprudence* (Oxford, 1916), pp. 31 *seq.*; and Sir H. S. Maine, *Ancient Law* (ed. Sir F. Pollock, London, 1906), chap. iii and iv.

See J. Austin, *Lectures on Jurisprudence* (London, 1869), vol. i, lect. i.

Cf. also the description of natural law given by Grotius with the passage following it from Aristotle:—

Grotius, i, 1, 10:—*Jus naturale est dictatum rectæ rationis indicans actui alicui ex ejus convenientia aut disconvenientia cum ipsa natura rationali [ac sociali], inesse moralem turpitudinem aut necessitatem moralem, ac consequenter ab auctore naturæ Deo talem actum aut vetari aut præcipi.* (Natural law is the dictate of right reason, indicating that any act, from its agreement or disagreement with the rational [and social] nature [of man], has in it a moral turpitude or a moral necessity; and consequently that such act is forbidden or commanded by God, the author of nature.)

Arist., *Nic. Eth.* v, 10:—

Τοῦ δὲ πολιτικοῦ δικαίου τὸ μὲν φυσικὸν ἐστὶ τὸ δὲ νομικόν, φυσικὸν μὲν τὸ πανταχοῦ τὴν αὐτὴν ἔχον δύναμιν, καὶ οὐ τῷ δοκεῖν ἢ μὴ, νομικὸν δὲ ὃ ἐξ ἀρχῆς μὲν οὐθὲν διαφέρει οὕτως ἢ ἄλλως, ὅταν δὲ θῶνται διαφέρει. (Civil justice is partly natural and partly conventional: that is natural which possesses the same validity everywhere, and does not depend on being deliberately adopted or not; while that is conventional which in the first instance does not matter whether it assumes one form or another, it matters only when it has been laid down.)

contrast between natural law and positive law is familiar enough in Greek tragedy and elsewhere.<sup>1</sup> Many things are shocking to morality which it is not convenient to pronounce illegal. Conversely many laws may be broken, for instance such as deal with *mala prohibita* rather than *mala per se*, without any violation of the moral law. None but a sensitive conscience will be shocked because a friend rides his bicycle on the pavement in a lonely place where the road is bad. The modern use of the expression 'law of nature' does not differ greatly from the earliest. 'By the ethical school I mean,' says a recent writer, . . . 'those authors who throw their main strength in investigating the universal moral and social conditions of government and laws, or at any rate civilised government and laws, and expounding what such governments and laws are, or ought to be, so far as determined by conformity to these conditions. This is the nearest account I can give in few words of what is implied in modern usage by the terms law of nature, *droit naturel* or *Naturrecht*.'<sup>2</sup> To this account it must perhaps be added that 'law of nature' in modern usage expresses those rules of morality by which the outward acts of man are tested, whether their area be co-extensive with or larger than that of positive law. But it was neither in its earlier nor its modern use that the law of nature exercised an influence so profound over international law.

To understand that influence, a brief reference must be made to the law of nature as it figured in the Stoic philosophy. In the Cosmogony of Zeno the law of nature indicated the physical rules which determined the dependence of the universe upon the evolution of πνεύμα or primitive substance.<sup>3</sup> When Stoicism became a fashionable creed in Rome, the popular mind was most vividly impressed by the simplicity which distinguished its votaries in an age of growing luxury. Soon arose a picture, ideally attractive, of a natural state of society to which the artificiality of a perverse age had been happily unknown. The society was conceived of as controlled by rules of transcendent because spontaneous justice, and to these rules the familiar description 'law of nature' was applied.

<sup>1</sup> Cf. Phillipson, *op. cit.* vol. i, pp. 53 seq.

<sup>2</sup> Sir F. Pollock, *History of Science of Politics*, p. 110.

<sup>3</sup> Cf. Verg., *Æn.* vi, 724:—

Principio cælum ac terras camposque liquentes,  
Lucentemque globum Lunæ Titaniaque astra  
Spiritus intus alit, totamque infusa per artus  
Mens agitat molem, et magno se corpore miscet.



Under another name this law of nature was to play an incalculable part in the development of the law of Rome. The exclusive jealousy of the foreigner, which is so characteristic of ancient societies, had closed the door of the *jus civile*, or native Roman law, to alien residents. To adjust disputes when one of the parties was an alien, the Prætor had pieced together a body of rules drawn collatively from the communities which lined the Mediterranean sea-board. To these rules was given, by reference to their source, the name *jus gentium*,<sup>1</sup> or law of nations. In its origin it was despised as an inferior system having no part in the ceremonious observances which distinguished the indigenous code. In fact, it soon became the source from which a wealth of equitable principle was obliquely infused into the Roman system, through the sympathetic medium of the Prætor's edict. It was inevitable that sooner or later Roman common-sense should apply the standard of convenience to the two distinct streams of which Roman jurisprudence was to be the splendid confluence; but the process was no doubt hastened by the increasing vogue of Stoic simplicity. It would be too long to recount here the various steps which preceded the recognition that the *jus civile* fell far short of the 'natural' standard which its cosmopolitan rival seldom failed to satisfy.<sup>2</sup> It is sufficient to say that by the time of Justinian the law of nature and the law of nations were commonly identified. We are now in a position to understand the part which these conceptions played in the success of Grotius. He addressed an audience which demanded nothing more than a stable principle, on which to construct the jural relations of states. To readers full of the mediæval respect for authority, the voice of Grotius would have been the voice of one crying in the wilderness, if he had prescribed or forbidden conduct by outspoken reference to the standard of moral right and moral wrong. But the matter assumed a different aspect when rules, which recommended themselves by a novel humanity, were further affiliated on the respectable authority of nature's law. To this result the later Roman identification of the law of nature and the law of nations materially contributed. The subject of Grotius' treatise was commonly and conveniently described as the law of nations; if then the law of nations was the law of nature, it followed that the relations of states

<sup>1</sup> Cf. Phillipson, *op. cit.* vol. i, pp. 69 *seq.*

<sup>2</sup> Maine, *Ancient Law* (ed. Pollock, 1906), pp. 59 *seq.* See also Moyle, *Justinian*, ed. 3, Introduction, p. 36.



must be governed by the laws of nature. Through this loophole men gradually infused into the practice of war the restraining influence of a humaner morality. In another way the confusion between *jus gentium* and the dawning science produced results of far-reaching importance. It led to the wholesale introduction into international law of the highly refined conceptions of Roman jurisprudence. As Sir Henry Maine<sup>1</sup> has expressed it, 'Setting aside the conventional or treaty law of nations, it is surprising how large a part of the system is made up of pure Roman law. Wherever there is a doctrine of the jurisconsults affirmed by them to be in harmony with the *jus gentium*, the publicists have found a reason for borrowing it, however plainly it may bear the marks of a distinctly Roman origin.'

The danger is manifest enough of basing international law on a body of rules so little determinable as the precepts of nature.<sup>2</sup> Between the moral and the immoral there is a shadowy border-line—a debatable land—which has long been the battlefield of ethical writers. If men are not agreed on the points which natural law allows or disallows, there will be as many standards of law as there are commentators. This confusion has thrown much undeserved discredit upon international law. Many writers in dealing with concrete matters of controversy have appealed to the law of nature in the terms appropriate to an English barrister who hands up to the court a recent decision in the House of Lords. A French writer,<sup>3</sup> for example, applies the 'natural' standard to one triviality after another with complacent regularity, and thus reinforced makes short work of terrestrial precedents. So abused, the law of nature becomes a subtle and disingenuous pretext for dogmatism.

It may be asked, What is the real relation of the so-called law of nature to the international law of to-day? A study of diplomatic correspondence almost suggests the rule, 'When no other argument offers, try the "law of nature."' <sup>4</sup> On

Law of  
nature in  
modern  
times.

<sup>1</sup> *Ancient Law* (ed. Pollock, 1906), p. 100.

<sup>2</sup> To the 'natural' school of jurists belong Puffendorf, *De jure naturæ et gentium* (1672) (see article on him by C. Phillipson in *Great Jurists of the World*, pp. 305-344); Thomasius, *Fundamenta juris naturæ et gentium* (1705); Burlamaqui, *Principes du droit naturel et politique* (1747); Rutherford, *Institutes of Natural Law* (1754), and many other writers. A recent 'naturalist' is J. Lorimer, *Institutes of the Law of Nations*, 2 vols. (Edinburgh, London, 1883-4)—he defines the law of nations as the 'law of nature realised in the relations of separate nations' (vol. i, pp. 1, 19).

<sup>3</sup> Hautefeuille.

<sup>4</sup> For example, in the Anglo-American controversy, 1823-6, as to the navigation of the St. Lawrence, the United States appealed to the 'general principles of the law of nature.'

principle it would seem that the law of nature is to international law exactly what it is to positive law. It cannot be cited to overrule the positive precepts of either, but these precepts will, if possible, be construed consistently with the moral law. The influence of natural law is intangible; it is, so to speak, 'in the air,' colouring the views we take of positive law, but never to be cited in its teeth. What then are the principal materials with which international law is concerned? They are to be found in the various precedents from which the general practice of states in their mutual dealings is deducible. It deals with that practice as it is, and not, at least primarily, as it ought to be. Blackstone's *Commentaries* is one thing; Bentham's *Theory of Legislation* is another. There have been too many Benthams in the history of international literature, and their failure to distinguish between what is and what ought to be has tended to discredit their real services.<sup>1</sup>

The present chapter seems the most convenient place to consider how far the practice of nations is properly described as legal. Is international law law at all? Lord Salisbury observed that 'it can be enforced by no tribunal, and therefore to apply to it the phrase "law" is to some extent misleading.'<sup>2</sup> Austin, in his *Province of Jurisprudence Determined*, laid it down that international law rests merely on the support of public opinion, and cannot therefore be properly called law. The English analytical school, of which Austin was the first and the greatest, is irretrievably committed to this doctrine. Putting on one side Austin's questionable inclusion in his scheme of the law of God, we find that he conceives of positive law as a command addressed to a political inferior by a political sovereign superior, acting as such, and followed by a sanction in the event of disobedience. This conception clearly excludes international law. It is proposed to consider how far the exclusion is academic, and how far it is supported by essential differences.

The answer to these questions depends on the legitimate scope of the term 'law.' If the significance of this term be examined, two main characteristics strike the attention: (i) the uniformity of law; (ii) the compulsoriness of law. The use of the word has, so to speak, bifurcated, according as the attention has lingered on one or the other aspect. It is used to denote on the one hand the unvarying sequence of natural phenomena,

The analysts and international law.

Meaning of 'law.'

<sup>1</sup> Cf. Lord Salisbury's remark reported in *The Times* of July 26, 1897:— 'International law . . . depends generally on the prejudices of the writers of text-books.'

<sup>2</sup> *Loc. cit.*

and on the other hand the positive laws peremptorily imposed by a sovereign upon his subjects. By the expressions 'law of refraction' and 'law of gravitation' nothing is conveyed, as Professor Holland has well expressed it, but that rays are refracted and objects do gravitate. These latter uses are metaphorical and therefore unobjectionable.

With international law the case stands otherwise. Either it does possess the essential characteristics of law, or it does not; if it does not, the very closeness of its resemblance thereto, the very legal complexion of its rules, makes it imperative to notice the chasm between them. It is by no means clear that the objections of Austin can be dismissed as pedantic. They are objections of an essentially practical kind. Take away from the meaning of 'law' its sanction—the evil in which society involves the lawbreaker—and you leave little that is characteristic of the word.

International law as law proper.

Sanction of international law.

What is the sanction of international law? That there is some punishment for the wrongdoer is clear, unless the wrong is done to a nation too weak to resist, or too little interested to make it worth while to incur the trouble of resistance. There is always a heavy penalty in money and in human life and suffering involved even in a successful war. When wars were lightly entered upon for personal or dynastic reasons, this consideration exercised but little restraining influence; but in proportion as the issues of peace and war pass from the hands of irresponsible individuals into those of responsible governments, and wars become more completely national and more destructive to trade and widespread in their effects, so will the fear of them operate to keep nations within the bounds of recognised international rules on an ever-growing class of subjects. The punishment of a nation which defies international law is vastly greater than that of an individual who breaks a moral though not a legal command; and with the development of the tendency, which has become very marked in the past few years, for nations to agree upon codes of rules of international law, an increasing number of those rules will pass into a region where in validity they will be scarcely distinguishable from the precepts of the strictest Austinian law, owing mainly to the growing reluctance to face a war whenever a legal or quasi-legal decision offers a method of avoiding it without loss of prestige. If, for instance, the Hague Convention of 1907 establishing an International Prize Court, and the Declaration of London, which covers, with two or three important exceptions, the whole field of the relation of belligerents to neutral



trade, were ratified, the decisions of the proposed court would soon become in practice as binding as the command of an Austinian political superior with a police force at his back. That court would in fact be a political superior established by the nations over themselves with a power (within a strictly limited area) to command, which from the very nature of the case will be equivalent to a power to enforce.

But though this may be in practice the case, yet in principle the commands of an International Prize Court would be backed by nothing more binding than the force of opinion and the voluntary acquiescence of the nations concerned; while in all matters not coming within its agreed jurisdiction, international law can make no pretence to regulate the occasions on which recourse may be had to war, the litigation of states. The result is strangely paradoxical. As between Nation A and Nation B international law declares A bound to do a certain act. A refuses: it has broken the law. War follows in which A is victorious. So far as international law is concerned the nation is now justified in its refusal. Such a practice is almost anarchical, and no analogies, however striking or numerous, between international law and law proper can blind us to the impassable gulf which divides them. Nor has the absence of a superior able to enforce obedience to law failed to exercise a weakening influence on the stability of international rules.

An attentive study of European history suggests the conclusion that respect for irksome international obligations has been commonly coincident with the lack of material strength to evade them. The Russian denunciation of the Treaty of Paris is an instance in point. In 1856 Russia undertook by that treaty not to maintain a fleet in the Black Sea. In 1870, while the hands of Europe were tied by the Franco-Prussian War, she published a circular repudiating her obligation. England protested at the time, and a Declaration of London (January, 1871) solemnly affirmed the inviolability of treaties. Russia, in the words of Mr. W. E. Hall, 'as the reward of submission to law was given what she had affected to take.'<sup>1</sup> Her acquiescence in the Declaration is sometimes cited as a success for the authority of international law: it is to be hoped that its principles will not be exposed to many such Pyrrhic victories. A most damaging blow was struck by one of the greatest European statesmen of the nineteenth century, and international law will not soon recover from the cynical contempt with which Prince Bismarck was never tired of bespattering it. The action

Difference between international law and law proper.

Treaties and obligations.

<sup>1</sup> *International Law* (7th ed. 1917), p. 366.



of Austria, too, in annexing Bosnia and Herzegovina in 1908,<sup>1</sup> if it was not quite so flagrant as that of Russia in 1870, suggested nevertheless that the enunciation of the inviolability of treaties, though useful as an idea for the guidance of international conduct, cannot always be trusted to be of practical effect.

Nature of  
international  
rules.

It is not easy to see in the analogies which have been cited between international and municipal law any reason for modifying the above opinions. They have been well summarised by Sir F. Pollock.<sup>2</sup> He points out that international rules have been discussed by the methods appropriate to jurisprudence, and not by those of moral philosophy. This is no doubt true, but a practical explanation suggests itself. The inconvenience of submitting every international dispute to a supposed absolute standard of right and wrong would be intolerable. Diplomatic correspondence is lengthy enough, without throwing upon diplomatists the duty of solving the nicest questions of abstract morality. Hence the view, not that international law is a complete entity, if only it could be found, but that its rules have been gradually and doubtfully collected from the varying practice of states. The method of inquiry involved by this theory is the patient examination of precedents—an examination which inevitably assumes a legal form. In the same passage Sir F. Pollock points out that there is an international morality distinct from and compatible with international law in the usual sense. We are not sure that this argument means more than that those who first sought to impose moral obligations upon states saw that there were ideals of conduct too exalted for international acceptance. Like practical men they exacted the highest standard for which obedience was to be hoped, and distinguished what lay beyond as admirable, but not obligatory. In other words, the difference between international law and international morality is a difference of degree and not of kind, and it may be doubted whether the judgment of publicists would be severe or strongly adverse upon a nation which took up arms to avenge an admitted outrage on international morality.

It may be conceded that 'the proper scope of the term "law" transcends the limits of the more perfect examples of "law"';<sup>3</sup> it may even be doubtfully admitted that the word, at its vanishing point, may be used to describe the usages of a

<sup>1</sup> See p. 147, *infra*, where this case is dealt with in more detail.

<sup>2</sup> *Oxford Lectures and Other Discourses* (London, 1890), pp. 18 seq.

<sup>3</sup> Hall, 7th ed. p. 14.

community when a legalised self-help is the only redress for wrong; but such observances become clearly non-legal if the lawbreaker and the injured party are equally entitled to pray violence in aid, and if success is retrospectively allowed to determine the justice of their original quarrel.

It is, of course, in no way inconsistent with the views here set forth that certain branches of international law, *e.g.* the laws of contraband, are treated as binding in municipal tribunals. The reason is that they have been adopted into the municipal law of the state which administers them. In England this adoption may be due directly to the legislature,<sup>1</sup> or to the judges who indirectly effect changes in the law.<sup>2</sup>

Sir F. Pollock has made the following observations on the nature of international rules: 'We are not called upon to consider here whether they are more nearly analogous to the law administered by courts of justice within a state, or to purely moral rules, or to these customs and observances in an imperfectly organised society, which have not fully acquired the character of law, but are on the way to become law.'<sup>3</sup> The analogy last suggested is no doubt a fairly exact one, but it must always be remembered that international law may have attained to a perfect development of type, and may therefore be an inchoate law never destined to reach maturity.

It could only become perfect law if the general body of states comprised a tribunal sitting to decide disputes by reference to established principles, and able to enforce their awards on recalcitrant members of the international family. It would then become law without ceasing to be international. It was hoped that the Hague Conference of 1907 might result in the establishment of a court clothed with the first but not with the second of the above attributes; and the institution of such Conferences naturally directed attention to the possibility of an age of peace. Serious thinkers, not daring to hope that the future will differ materially from the past, while human character and human motives remain unchanged, gave little encouragement to the more ambitious of the Russian proposals which led up to the first Hague Conference. The charge of cynicism sits lightly upon those who sorrowfully believe in the inevitableness of war, for such a view is consistent with a very sincere detestation of its horrors. Before

The Hague  
Conferences.

<sup>1</sup> 7 Anne, c. 12.

<sup>2</sup> Cf. on the question what rules of international law will be treated as binding by municipal courts, *Cook v. Sprigg* (1899), A.C. 572; *West Rand Central Gold Mining Co. v. Rex* (1905), 2 K.B. 391. And see p. 40 *infra*.

<sup>3</sup> *Jurisprudence*, p. 13.

the outbreak of the Great War, 1914, there was a tendency in various quarters,<sup>1</sup> particularly among those whose occupations happen to be pacific,<sup>2</sup> to exaggerate the other side of the picture. Their views receive little encouragement from men who have seen war face to face. It is a curious commentary on the psychological materials to which our modern peacemakers are driven, that their strongest argument is drawn from the growing destructiveness of modern weapons.<sup>3</sup>

International law  
and municipal law.

The question has been often discussed and differently answered, how far civilised states consider the admitted rules of international law to be binding upon their own tribunals in cases not covered by the municipal law.<sup>4</sup> So far as this country is concerned the statute 7 Anne, c. 12 is expressed to 'declare' not to 'enact,' the privileges of ambassadors, and the preamble recites an insult 'contrary to the law of nations.' A judgment of Lord Mansfield<sup>5</sup> contains an interesting observation on this point: 'I remember a case before Lord Talbot of *Buwot v. Barbert* in which Lord Talbot declared a clear opinion that the law of nations in its full extent was part of the law of England, and that the law of nations was to be collected from the practice of different nations and the authority of writers. And accordingly he argued and determined from such instances and the authority of Grotius, Barbeyrac, Bynkershoek, Wiquefort, etc., there being no English writers of eminence on the subject. I was counsel in the case and have a full note of it. I

<sup>1</sup> For German views, see C. Phillipson, *International Law and the Great War* (London, 1915), pp. 32 seq.

<sup>2</sup> Thus T. D. Woolsey, a very humane writer, cheerfully observes (*Introduction to International Law*, ed. 5, p. 184):—'To states, by the divine constitution of society, belong the obligations of protecting themselves and their people, as well as the right of redress, and even perhaps that of punishment. To resist injury, to obtain justice, to give wholesome lessons to wrongdoers for the future, are prerogatives deputed by the Divine King of the world to organised society, which, when exercised aright, cultivate the moral character and raise the tone of judging throughout mankind.' The passage is well known from Mr. Gladstone's Midlothian speech, March 17, 1880: 'However deplorable wars may be, they are among the necessities of our condition; and there are times when justice, when faith, when the welfare of mankind require a man not to shrink from the responsibility of undertaking them. And if you undertake war, so also you are often obliged to undertake measures which may lead to war.' The reader will remember numerous pronouncements of a similar character that were made at various periods during the Great War.

<sup>3</sup> Cf. J. S. Bloch, *La Guerre*, 6 vols. Trans. from the Russian (Paris, 1898.)

<sup>4</sup> Cf. T. E. Holland, *Studies in International Law* (Oxford, 1898), pp. 176 seq.; J. Westlake, in *Law Quarterly Review*, vol. xxii (1906), pp. 14-26; reprinted in his *Collected Papers* (Cambridge, 1914), pp. 498 seq.; W. W. Willoughby, in *American Journal of International Law*, vol. ii, pp. 357 seq.

<sup>5</sup> *Triguet v. Bath* (1764), 3 Burr. 1478.



remember, too, Lord Hardwicke's declaring his opinion to the same effect.' <sup>1</sup>

Other English authorities in the eighteenth century and in the earlier part of the nineteenth are similarly in favour of the view that international law forms part of the law of England, so that English courts are bound to take cognisance of it and apply it in a proper case whether or not the English law provides them with an express warrant.<sup>2</sup>

The generous verbal tributes to international law, which are so familiar, are not reinforced by practice on this point, and the opposite conclusion forcibly stated in 1876, by Cockburn, C.J., in *R. v. Keyn*,<sup>3</sup> is difficult to refute: 'And when in support of this position . . . the statements of the writers on international law are relied on, the question may well be asked, Upon what authority are these statements founded? When and in what manner have the nations who are to be affected by such a rule as these writers, following one another, have laid down, signified their assent to it? to say nothing of the difficulty which might be found in saying to which of these conflicting opinions such assent had been given. For even if entire unanimity had existed in respect of the important particulars to which I have referred, in place of so much discrepancy of opinion, the question would still remain, how far the law as stated by the publicists had received the assent of the civilised nations of the world. For writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding the law must have received the assent of the nations who are to be bound by it. . . . Nor in my opinion would the clearest proof of unanimous assent on the part of other nations be sufficient to authorise the tribunals of this country to apply without an Act of Parliament what would practically amount to a new law. In so doing we should be unjustifiably usurping the province of the legislature. The assent of nations is doubtless sufficient to give the power of parliamentary legislation in a matter otherwise within the sphere of international law: but it would be powerless to confer without such legislation a jurisdiction beyond and unknown to the law, such as that now insisted on.'

To the same effect Lush, J.,<sup>4</sup> observed: 'International

<sup>1</sup> Cf. *Heathfield v. Chilton* (1767), 4 Burr. 2015.

<sup>2</sup> Blackstone, *Commentaries* (1765), iv, 67; Lord Ellenborough, in *Wolff v. Oxholm* (1817), 6 M. & S. 92; Lord Stowell, in *The Maria* (1799), 1 C. Rob. 350; *The Recovery* (1807), 6 C. Rob. 348.

<sup>3</sup> (*The Franconia*) L.R. 2 Ex. D. 202, 203.

<sup>4</sup> L.R. 2 Ex. D. at p. 239.



law . . . cannot enlarge the area of our municipal law, nor could treaties with all the nations of the world have that effect. That can only be done by Act of Parliament.'

An intermediate view was expressed by Lord Alverstone, C.J., in the case of the *West Rand Central Gold Mining Company v. The King*:<sup>1</sup> 'It is quite true that whatever has received the common assent of civilised nations must have received the assent of our country, and that to which we have assented, along with other nations in general, may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence which must show either that the particular proposition put forward has been recognised and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilised state would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognised, are not in themselves sufficient.'

This would appear to recognise that a rule of international law will, without municipal legislation, be enforced in a municipal court if it can be proved from history and not from text-books; but the dictum was not essential to the decision of the case.

Probably the British practice is accurately stated in the two following propositions: —

- (i) International law is not administered by municipal tribunals unless it has been adopted by the state legislature, and such adoption will not be presumed.
- (ii) Municipal law will, where possible, be so construed in doubtful cases as not to conflict with the rules of international law.

In 'municipal tribunals' there are not, for the purpose of the above remarks, included national prize courts. These, though they may be bound by positive enactments of the legislature, administer a law deduced from international practice and agreement which need not necessarily have been endowed with any legislative authority.<sup>2</sup>

<sup>1</sup> (1905), 2 K.B. 391.

<sup>2</sup> As to the relation of prize courts to the municipal law of their country, see *infra*, p. 50.

In the United States the doctrine that international law is part of her own national law has been recognised for more than a century. In 1804 Marshall, C.J., declared that 'an Act of Congress should never be construed to violate the law of nations if any other possible construction remains;' <sup>1</sup> and a few years later (1815), he held that the law of nations constituted 'part of the law of the land.' <sup>2</sup> View in the United States.

Similarly, in 1871 the American court observed: 'No single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilised countries. It is of force, not because it is prescribed by any superior power, but because it has been generally accepted as a rule of conduct.' <sup>3</sup>

Again, in 1899 the Supreme Court of the United States, <sup>4</sup> declaring the exemption from belligerent capture of coast fishing vessels peacefully pursuing their ostensible calling, in accordance with an inveterate usage of civilised peoples and despite the absence of express treaty, proclamation, or municipal law, observed (Gray, J., delivering the judgment of the majority of the court): 'International law is a part of our law, and must be ascertained and admitted by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the custom and usages of civilised nations.' <sup>5</sup>

We may summarise briefly the views expressed in this chapter as to the real nature of international law: It consists of rules to control relations which have a legal rather than a moral character; its treaties and controversies have assumed a legal guise, encouraged by a general willingness to increase their apparent obligatoriness, but it is habitually deficient in that coercive side of the term law, which is above all others essential and characteristic. All civilised nations agree that they are bound by its principles, and in the majority of cases find it convenient to observe them. On the other hand, these Summary.

<sup>1</sup> *The Charming Betsey* (1804), 2 Cranch, 64, at p. 118.

<sup>2</sup> *The Neveide* (1815), 9 Cranch, 383, at p. 423.

<sup>3</sup> *The Scotia* (1871), 14 Wallace, 170, at pp. 187, 188.

<sup>4</sup> *The Paquete Habana* and *The Lola* (1899), 175 U.S. 677, at p. 700.

<sup>5</sup> This statement was a reproduction of a passage in the judgment delivered in *Hilton v. Guyot* (1894), 159 U.S. 113, at p. 163.

principles are not infrequently violated, and breaches may be consecrated by adding successful violence to the original offence. In reality the sources of its strength are three:—

- (i) A regard—which in a moral community often flickers but seldom entirely dies—for national reputation as affected by international public opinion.
- (ii) An unwillingness to incur the risk of war for any but a paramount national interest.
- (iii) The realisation by each nation that the convenience of settled rules is cheaply purchased, in the majority of cases, by the habit of individual compliance.

## PART I

### SOURCES OF INTERNATIONAL LAW; INTERNATIONAL PERSONS; AND STATE REPRESENTATIVES

#### CHAPTER I

##### SOURCES OF INTERNATIONAL LAW

THE name 'International Law,' so far as its use in English is concerned, is due to Jeremy Bentham. In a well-known passage he observes: 'The word "international," it must be acknowledged, is a new one, though it is hoped sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the branch of law which goes commonly under the name of the law of nations: an appellation so uncharacteristic that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence. The Chancellor D'Aguesseau has already made, I find, a similar remark: he says that what is commonly called *droit des gens*, ought rather to be termed *droit entre les gens*.'<sup>1</sup>

This terminological innovation was already, in a Latin form—*jus inter gentes*—adopted in the sixteenth century by the Spanish Dominican theologian and jurist, Franciscus a Victoria;<sup>2</sup> this usage was followed, and its greater appropriateness was emphasised, by the distinguished English civilian, Richard Zouche, in the next century.<sup>3</sup> The other early writers on the law of nations invariably made use of the less definite and less precise expression, *jus gentium*.

International Law is to be carefully distinguished from the body of rules variously known as Conflict of Laws, Private International Law, and Comity of Nations. These rules form

<sup>1</sup> Bentham, *Introduction to the Principles of Morals and Legislation* (1789), xvii, 25, note.

<sup>2</sup> (1480-1546). *Relectiones theologicæ* (Lyons, 1557). See the article on him by C. Phillipson, in *Journal of Comparative Legislation* (London, July, 1915).

<sup>3</sup> *Juris et judicii fecialis sive juris inter gentes et quæstionum de eodem explicatio* (Oxford, 1650). See the article on him by C. Phillipson, in *Great Jurists of the World*, pp. 220 seq.



part of the private law of every civilised nation, and determine the appropriate *jus* and the appropriate *forum* in disputes between persons of different nationalities, or different domiciles, as the case may be. They are in no way concerned with the reciprocal legal relations of states.

Sources of  
international  
law.

It was pointed out in the introductory chapter that by a comparatively modern development in the history of nations, codes are being drawn up which, like the Hague Conventions of 1899 and 1907 and the Declaration of London of 1909, are partly declaratory of existing practice, so far as it can be ascertained, and partly agreements enunciating new law; and even should such codes fail to be ratified, they will probably be treated as carrying great authority by all the nations whose delegates shared in their drafting, unless the failure to ratify implies a specific repudiation. It was suggested that, in all matters not dealt with by such codes, the rules of international law are not a perfect system, existing somewhere in the clouds and intuitively determinable, but are generalisations inductively drawn from the practice of civilised states in their mutual dealings. The adoption of this view effects an immense simplification in the study of international law; when once the *a priori* method is laid aside, the occasions for obscurity become infinitely fewer, and the science at least rests upon a firm historical basis. To decide whether a given practice is legal or illegal, an examination of precedents is necessary, of a kind very familiar to all lawyers. If authority pronounces itself in favour of a particular practice, a writer who disapproves of it must content himself with advocating a change.

We may, with the late Professor Westlake,<sup>1</sup> admit 'reason' as a source of international law, in so far as by 'reason' is meant the discovery of principles from precedents, the application of these principles to new cases and, it may be, the propounding of new rules to meet the changing conditions of modern life; but international law will never acquire the strength sufficient to carry it through a period of strain unless authority is made to exclude individual opinion almost as decisively as it does in our English system. To underrate the influence of the great jurists would be a proof of inattention or ignorance; but aggressive states are little likely to soothe the suggestions of ambition by admonitions drawn from Grotius, Puffendorf, Vattel, Heffter, or other international jurists, unless the practice of rival nations has lent them an additional semblance of authority. If these views are well

<sup>1</sup> Westlake, *International Law* (Cambridge, 1910), Part I, p. 15.

founded, the sources<sup>1</sup> of international law ought not to be very difficult to discover. They will first be sought in such formal agreements as have been drawn up by international conferences of statesmen and jurists, and where these fail, it is hardly too much to say that the sole source of law is national practice. But several media of proof are admissible to establish this practice; and two qualifications are necessary. Recent practice is more binding than that which is older, and where nations differ the value of competing precedents must be determined by reference to the number and importance of the states adhering to each, and their relative interest in the subject in question. Rules of maritime law, for instance, must be mainly sought in the practice of the leading maritime states.

The following are the chief agencies by which the rules of international law are commonly ascertained:—

- (i) The writings of jurists.
- (ii) International treaties.
- (iii) Opinions invited by their own Governments from experts in international practice.
- (iv) Declarations of law made by tribunals of international arbitration.
- (v) Decisions of prize courts and similar tribunals.
- (vi) Private instructions given by individual states to their armed forces, and to diplomatic representatives.

These may be considered in order.

## I. WRITINGS OF JURISTS

The writings of such men as Ayala, Gentilis, Grotius, Puffendorf, Bynkershoek, Vattel and G. F. de Martens have undoubtedly contributed greatly to the development of rules controlling the intercourse of states, and it is important to notice exactly how their influence has been exerted. In some cases, by minute historical investigation, these great jurists

<sup>1</sup> It is submitted that the above use of the term 'source' of law is the most correct and analogous. The Roman expression was *fons juris*, and the metaphor was responsible for a like ambiguity in Latin usage. In both popular and strict language the source of a legal rule is the author of its legal character. Thus in England the only source of law is the Crown and the two chambers acting harmoniously. Political speculation and the science of legislation are the 'sources' whence spring the *ideas* by which the 'source of law' is excited into activity (cf. however, Austin, Lect. 28). Some modern writers make use of the expression 'evidences of international law,' and classify under this heading the various sources of the law of nations hereinafter set out. (Cf. T. A. Walker, *The Science of International Law* (London, 1893), chap. 2.)

have influenced practice by recalling it to the channel of an almost forgotten precedent. In others they have openly advocated changes which, by their inherent reasonableness, have afterwards procured acceptance for themselves. Here, in an indirect and circuitous sense, works of writers give birth to law, just as the persuasive tongue of a diplomatist may cause the adoption or abandonment of an international practice; but the real source of the law, the decisive criterion of its existence, is not the argument of the book or the speech, but the imprimatur practically supplied by international adoption. It is no doubt true that these writers have been repeatedly cited in English courts (as well as in foreign), and that their opinions have often been judicially considered: the explanation is to be found in the presumption, inevitably drawn by English lawyers, that such authorities may be relied upon to supply a trustworthy statement of existing practice. They are cited much as Blackstone and Coke are cited, not to make legal rules, but to prove their existence, and to construe them in a doubtful case. The passage of Chancellor Kent<sup>1</sup> is well known in which he affirms that 'no civilised nation that does not arrogantly set all law and justice at defiance will venture to disregard the uniform sense of the established writers in international law.' This view was accepted in the recent American case, *The Paquete Habana*,<sup>2</sup> where, however, Gray, J., added that the works of such writers are consulted by courts of justice, not for their speculations as to what the law ought to be, but for trustworthy evidence of what the law really is. Similarly, in *Reg. v. Keyn*,<sup>3</sup> Lord Coleridge emphasised the importance of the writings of jurists as evidence of prevailing international law and usage; and Cockburn, C.J., held that the opinions of such writers could not make law apart from the assent of civilised nations. In *Macartney v. Garbutt*,<sup>4</sup> Matthew, J., deciding the question of exemption in the case of a subject who had unreservedly been received as a member of a legation from a foreign state, was guided by the opinions expressed in the productions of leading authors. It is universally conceded, however, as Lord Alverstone, C.J., observed,<sup>5</sup> that 'the views

<sup>1</sup> *Commentaries on American Law*, i, 18. (This passage was quoted with approval by Mr. Justice Gray, in delivering the opinion of the Supreme Court of the United States in *The Paquete Habana*; *The Lola* (1899), 175 U.S. 677.)

<sup>2</sup> (1899), 175 U.S. 677, 700. See also *Hilton v. Guyot* (1894), 159 U.S. 113, 163, 214.

<sup>3</sup> (1876), L.R. 2 Exch. Div. 63, at pp. 154, 159.

<sup>4</sup> (1890), 24 Q.B.D. 368, at p. 369.

<sup>5</sup> *West Rand Central Gold Mining Co. v. Rex* (1905), L.R. 2 K.B. 391, at p. 402.



expressed by learned writers on international law have done in the past, and will do in the future, valuable service in helping to create the opinion by which the range of the consensus of civilised nations is enlarged.' But it is quite certain that no conclusions resting upon *a priori* reasoning, and unsupported by international practice, ever have commanded the 'uniform sense' of such writers. Their unanimity will usually coincide with a reasonable unanimity, or at least a preponderating weight, of international precedent.

## II. TREATIES

We are here concerned not generally with the conventional law of nations, but with treaties as evidentiary of legal rules. For this purpose a broad classification of treaties may be usefully made into:

- (a) treaties which purport to be declaratory of existing law, or formative of new law (the latter may be conveniently termed law-making treaties);
- (b) non-declaratory treaties.

### (a) *Declaratory Treaties*

The value of such agreements is very high, though it will naturally vary with the influence and number of the nations who are co-signatories. If a majority of the civilised powers formally and deliberately sanction a principle, its legal character becomes definitively binding upon those who assent to the treaty, and it may be, by effluxion of time, upon other nations also.<sup>1</sup> The Congress of Vienna in 1815, the Declaration of Paris in 1856 (in which the signatory parties proposed to introduce 'fixed principles' in international relationships), the Geneva Conventions of 1864 and 1906, the Declaration of London of 1871,<sup>2</sup> the Treaty of Washington of the same year, the Berlin Congress of 1885, the Hague Peace Conferences of 1899 and 1907, and the Declaration of London of 1909, all belong to or resulted in the class of agreement under consideration. A declaratory treaty, which is largely adopted by influential states, will hardly be resisted for long by an isolated non-signatory, and even where the treaty is avowedly formative of new law, convenience, public opinion, and the authority of its sponsors are likely insensibly to induce acceptance.

<sup>1</sup> The Declaration of Paris was respected during the Spanish-American War (1898) by both belligerents, though they were non-signatory powers.

<sup>2</sup> See *supra*, p. 35.



*(b) Non-declaratory Treaties*

Under this head may be quite conveniently included all conventions between individual powers, or a number of powers falling short of a concert, to affect particularly the relations of the signatory powers. It has been often observed that such treaties ordinarily possess very little evidentiary value; indeed, they are less likely to show what the law is than what the law is not, for nations, like individuals, are unlikely to stipulate expressly for objects of which the law itself assures them. If two nations agree by treaty that a particular article shall be contraband, there is *prima facie* reason for supposing the commodity to be innocent by the common law of nations. Bynkershoek<sup>1</sup> has grafted a reasonable qualification upon the severe common-sense of this view. He points out that when a long succession of treaties between the great civilised states has stipulated for a modification of the common law, so that such a modification has in practice become almost universal, there comes a time when the original rule perishes from inanition, and is replaced by its successor. The exact moment of change may be difficult to determine, but illustrations of the completed process could be readily multiplied.

### III. OPINIONS OF JURISTS IN ANSWER TO THEIR OWN GOVERNMENTS

The value of such opinions as evidence of international law is clearly somewhat one-sided. At most they can only bind the country which elicits them, and even then, if the point of submission be genuinely doubtful, the obligation is mainly conscientious. Still there are occasions when such opinions may be usefully employed by an opponent in reliance on a principle which in English law is called estoppel. A civilised nation could scarcely act in the teeth of its own law advisers. In this country the opinions of the law officers of the Crown in international disputes certainly supply a weighty indication of English practice, and if foreign countries associate themselves with such doctrines in a more overt manner, a general rule springs up, the obligation of which Great Britain could hardly disregard.

<sup>1</sup> *Quæstiones juris publici*, lib. i, c. 14, § 69.

## IV. TRIBUNALS OF INTERNATIONAL ARBITRATION

In the nineteenth century about thirty considerable disputes were settled by means of arbitration tribunals.<sup>1</sup> The importance which the judgments in such cases might be expected to possess has been sometimes lessened by a previous agreement on the legal points involved, leaving only the facts to be dealt with in the submission. Thus in the Geneva Arbitration the United States insisted upon a preliminary statement of the principles which were to guide the arbitrators in their consideration of the facts. Where a reference is unlimited, and the tribunal impressive, the moral weight of its decision will no doubt be considerable; third parties, of course, are in no way bound by its conclusions, and in at least one case a party to the submission has repudiated the decision.<sup>2</sup>

## V. PRIZE COURTS

Prize courts are often called international courts, and the name is justified in so far that the law administered by such tribunals is not municipal but international. They are, however, the creatures of positive municipal law, and their decisions are binding, not through any international sanction, but because the court is seised, in the legal phrase, of the subject in dispute, and can make practically effective the jurisdiction committed to it by its own positive law. These courts are set up by belligerents to try disputes between their own governments and subjects and the governments and subjects of other states. Their decisions supply very valuable evidence of international practice, and by comparing the judgments of the prize courts of different countries on similar points, one is

<sup>1</sup> For the effect of international arbitration on international law, see Phillipson, *Studies in International Law* (London, 1908), pp. 1-49.

<sup>2</sup> In 1863 the United States rejected a hostile award on the British-American boundary question. It is clear, however, that the Hague Peace Conferences have extended the scope of international arbitration, as will be shown in the chapter on International Arbitration, *infra*. Sir J. Pauncefote and Sir H. Howard, neither of them idealists, reported to Lord Salisbury on July 31, 1899:—

'The most important result of the Conference is the great work it has produced in its "Project of a Convention for the pacific settlement of international conflicts." That work, even if it stood alone, would proclaim the success of the Conference. It was elaborated by a committee composed of distinguished jurists and diplomatists, and it constitutes a complete code on the subject of good offices, mediation, and arbitration. Its most striking and novel feature is the establishment of a Permanent Court of International Arbitration, which has so long been the dream of the advocates of peace, destined, apparently, until now never to be realised.'

often enabled to arrive at positive conclusions of international law.

Functions of  
prize courts.

The functions of such courts were well described by Sir W. Scott in *The Maria*:<sup>1</sup> 'In forming that judgment, I trust that it has not escaped my anxious recollection for one moment, what it is that the duty of my station calls for from me: namely, to consider myself as stationed here not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out without distinction to independent states, some happening to be neutral, and some to be belligerent. The seat of judicial authority is indeed locally here, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question, if sitting at Stockholm<sup>2</sup>—to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. If therefore I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question. . . .'

Law admini-  
stered by  
prize courts.

In 1916, in *The Zamora*, the Privy Council said that 'the law which the Prize Court is to administer is not the national or, as it is sometimes called, the municipal law, but the law of nations—in other words, international law. . . . A court which administers international law must ascertain and give effect to a law which is not laid down by any particular state, but originates in the practice and usage long observed by civilised nations in their relations towards each other or in express international agreement.'<sup>3</sup> In 1915, in *The Elida*, the Imperial Supreme Prize Court in Berlin observed in the course of its judgment: 'The prize courts, when judging of the legality of prize actions, can take general international principles only into account when the Prize Regulations contain no instructions and, therefore, tacitly refer to the principles of international law.'<sup>4</sup>

<sup>1</sup> (1799), 1 C. Rob. at p. 349. Cf. *The Recovery* (1807), 6 C. Rob. 341, 348; *The Leucade* (1855), Spinks, 217; *The Ostsee* (1856), 5 Moo. P.C. 150.

<sup>2</sup> The neutral litigant was of Swedish nationality.

<sup>3</sup> *The Zamora* (1916), 2 P.C. 1, at p. 12. Similarly, in *The Odessa* (1915), 1 P.C. 554, at p. 560.

<sup>4</sup> *The Elida* (1915), *Amer. Journ. of Int. Law*, vol. x (1916), p. 917.



It has been observed that the authority of prize courts rests upon municipal law.<sup>1</sup> In *The Zamora* the Privy Council observed: 'It cannot, of course, be disputed that a Prize Court, like any other court, is bound by the legislative enactments of its own sovereign state. A British Prize Court would certainly be bound by Acts of the Imperial Legislature. But it is none the less true that if the Imperial Legislature passed an Act, the provisions of which were inconsistent with the law of nations, the Prize Court, in giving effect to such provisions, would no longer be administering international law. It would in the field covered by such provisions be deprived of its proper function as a Prize Court. Even if the provisions of the Act were merely declaratory of the international law, the authority of the Court, as an interpreter of the law of nations, would be thereby materially weakened, for no one could say whether its decisions were based on a due consideration of international obligations or on the binding nature of the Act itself. The fact, however, that the Prize Courts in this country would be bound by Acts of the Imperial Legislature affords no ground for arguing that they are bound by the Executive Orders of the King in Council.'<sup>2</sup> The power of dictating the grounds upon which their decision shall proceed is logically involved in this fact; it was assumed by England and France in the Napoleonic wars, and is assumed by Russia and other nations at the present day.<sup>3</sup> The practice is unfortunate, for international law is thereby menaced on its strongest side.

With the proposed establishment of the International Court of Appeal, provided for by the Hague Conference of 1907, we deal fully elsewhere: it is only necessary to point out here that its decisions (as well as those of the projected Permanent Court of Arbitration) would transcend in authority those of any national court, and form a body of case law which no nation, save in the most exceptional circumstances, would be likely to disregard.

<sup>1</sup> See Wheaton, *International Law*, ed. Phillipson (London, 1915), p. 614. Cf. Oppenheim, vol ii, § 434, p. 553, who holds that the trial of captured vessels is purely a municipal matter—prize courts applying only the law of their country. In the American case, *Thirty Hogsheads of Sugar v. Boyle* (1815), 9 Cranch, 191, 198, Marshall, C. J., observed: 'The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.'

<sup>2</sup> *The Zamora* (1916), 2 P.C. 1, at pp. 13, 14.

<sup>3</sup> See Sir E. (now Viscount) Grey in *The Times*, April 8, 1909.



## VI. INSTRUCTIONS ISSUED BY STATES TO THEIR ARMED FORCES, DIPLOMATIC AGENTS, ETC.

The practice of issuing manuals for the guidance of officers in the field was first adopted by the United States, towards the close of the American War of Secession. The Conference of Brussels (1874) was followed by a multiplication of such manuals, and instructions of this kind are now issued by Great Britain, France, Germany, and most other civilised countries. In 1899 the representatives of the powers attending the Hague Conference agreed to embody in their official instructions to their forces the provisions of the Convention then arrived at on the laws and customs of land warfare.<sup>1</sup> It is clear that the direct authority of a single manual may be of inconsiderable value, but if a rule is unanimously, or even generally affirmed in these private instructions, it is very reasonable to suppose that it has made its way into international law. The result is highly satisfactory. It is above all things desirable that the rules of war should be ascertainable, and a collation of the manuals of usage makes it possible to state with confidence many general rules on belligerent practice.<sup>2</sup>

<sup>1</sup> The present British manual was drawn up by Colonel Edmonds and Professor Oppenheim. The German official manual, *Kriegsbrauch im Landkriege*, issued in 1902 (recently translated into English by Professor Morgan), has deservedly been subjected to severe criticism, on the ground that many of the Hague regulations are therein harshly construed, and are incompatible with the spirit and object of the said Convention. The carrying out of the instructions of the German manual—not to mention other violations of war law—by the German forces in the Great War, called forth the unanimous condemnation of the civilised world.

<sup>2</sup> But in the recent *Bundesrath* controversy with Germany (1899), Lord Salisbury declined to be bound by the English Admiralty regulations. (See *Parliamentary Papers* (1900), *Africa*, No. 1.)

## CHAPTER II

### INTERNATIONAL STATUS OR PERSONS IN INTERNATIONAL LAW

STATES and states alone enjoy a *locus standi* in the law of Subjects of international law. nations; they are the only wearers of international personality. This fact has been sometimes obscured by the occasions on which one state finds itself face to face with the individual citizens of another, and is permitted to assume jurisdiction over them of a quasi-penal character, for acts not in themselves illegal. The practice is exceptional, and will be considered in its place. A clear distinction, too, must be drawn between states and their sovereigns or Governments. The Holy Alliance in 1820<sup>1</sup> attempted to set up particular types of governments as international entities, and agreements between states as agreements between their rulers; but the theory was repudiated by Lord Castlereagh in 1821, and it is contrary to the generally accepted principles of international law.

The diplomatic representatives of states in foreign countries are not themselves subjects of international law, and, as Professor Holland has noticed,<sup>2</sup> it is misleading to describe them as international persons. But at the same time they undoubtedly derive a reflected personality from their principals, and by this reflection their legal position is generally affected. Under these circumstances the present chapter may be conveniently followed by a brief description of the privileges and duties of diplomatic agents.

A state within the meaning of international law may be described as a permanently organised society, belonging to the family of nations, represented by a Government authorised to bind it, independent in outward relations, and possessing fixed territories. In detail every society claiming admission to the law of nations must satisfy the following requirements:—

- (i) It must be represented by a government which receives a *de facto* allegiance from its subjects.
- (ii) It must be a sovereign independent state.
- (iii) It must exhibit reasonable promise of durability.

<sup>1</sup> See *infra*, p. 93.

<sup>2</sup> *Elements of Jurisprudence* (Oxford, 1916), p. 394.

- (iv) It must possess definite territories.
- (v) It must be recognised as a member of the family of nations.<sup>1</sup>

It is proposed to examine the various elements attributed above to international personality.

Existence of  
a govern-  
ment.

(i) The society must be represented by a Government which receives a *de facto* allegiance from its subjects, and recognition of it as an international state may properly be postponed, owing to internal instability, as formerly in the case of Chile,<sup>2</sup> or while the issue of an armed revolt is still in doubt. The necessity for this requirement will be readily seen. The stability, and indeed the existence, of international relations would come to an end if negotiations with a Government were liable to be interrupted by assumptions of direct control on the part of its subjects. With the refinements of *de jure* claims international law is in no way concerned. For reasons which will appear later, it is, or should be, completely indifferent to the political character which the constitution of a particular country bears. Revolutionary committees, absolute monarchs, constitutional assemblies—all these are treated alike by the practice of nations, provided that they appear to rest upon a stable basis. The reservation is necessary, and is only an application of the caution, so familiar in private law, that negotiations are unsafe with an imperfectly accredited agent. But there may be a society under a *de facto* Government which is nevertheless not an independent state, as, for instance, where a territory is occupied by military force against the authority of a previously established Government. The Confederate States in these circumstances were conceded the rights of belligerency but not of international independence.<sup>3</sup> Such a Government lacks the element of durability which we shall see to be necessary.

Sovereign  
independ-  
ence.

(ii) The society must be a sovereign independent state, that is to say, its internal control of all persons and things within its territory must be complete and exclusive, and its

<sup>1</sup> States undistinguished by the above marks are in theory beyond the pale of international law. If civilised nations observe its rules in their dealings with barbarians, it is pursuant to the rule *legibus soluti legibus vivimus*. The English contention on the subject of dum-dum bullets supplies a curious illustration of this fact. The retention of the bullet was defended because it was found necessary to check the onslaughts of savage enemies. The legitimacy of the plea may be admitted on moral as well as legal grounds, if an equally effective and less barbarous check is unknown.

<sup>2</sup> Hall, 7th ed. (1917), p. 85.

<sup>3</sup> Wheaton (ed. Phillippson), p. 37. *Thorington v. Smith* (1868), 8 Wallace, pp. 8-11.

external relations must be independent of the control of any other society. This requirement is fundamental in modern international practice. It is, however, in no way essential to the conception of jural relations between states; it was little in harmony with the hierarchical bias of mediæval feudalism, to which the idea of dependence upon a superior was more familiar than that of independent equality. As Mr. Hall<sup>1</sup> truly says: 'If indeed a law had been formed upon the basis of the ideas prevalent during the Middle Ages, the notion of the absolute independence of states would have been excluded from it . . . it must have involved either a solidification of the superiority of the empire or legislation at the hands of the Pope.' The ground of this requirement of sovereign independence is substantially the same as that of the requirement of *de facto* allegiance to a Government: the object of both is to secure finality and permanence of obligation, to which the least degree of dependence upon a superior would be fatal. Speaking generally, therefore, there can be no degrees of independence. A state is either an independent unit or it is not, and there is no half-way house; though states in a position of imperfect independence may, like individuals, enter into relations of which international law is bound to take cognisance.

As the form of a state's government is irrelevant, so also is it irrelevant to consider the means by which it attained independence. International law has, or ought to have, no concern with the moral conduct of those who are responsible for its foundation.

The relations between states are of many varying degrees. Unions of states.  
Two or more states may be so closely united that the supreme power for all purposes, both foreign and domestic, is in one body, as in the case of England, Scotland and Ireland; and this is known as an incorporate union. If for domestic purposes the states exist as separate entities, their union is sometimes described as real, the instances given being formerly Sweden and Norway,<sup>2</sup> and now Austria and Hungary; but whether the union in any given case is incorporate, real, federal, or 'permanent personal'<sup>3</sup> is a question of nomenclature of no very great importance. Such distinction as there is between 'real' and 'federal' union is, perhaps, most properly described by

<sup>1</sup> *Int. Law*, 7th ed. p. 18.

<sup>2</sup> Sweden and Norway were separated by the Treaty of Karlstad, 1905.

<sup>3</sup> The term applied by Twiss to Austria-Hungary after the Pragmatic Sanction of 1723, which provided that the two states should be under one monarch subject to rules of succession by which they could never be separated.



the late Professor Westlake as lying 'not in the closeness of the international connection existing between the states united, but in the origin of that connection, the term federal being used to denote that a treaty is the origin of a connection identical in its international aspect with that which would be unhesitatingly called real if it arose from succession to a throne, or from internal constitutional change.'<sup>1</sup> Even the union of the United States of America, usually described as federal, is declared by Westlake<sup>2</sup> to be incorporate, and only federal by way of reminiscence.

#### Suzerainty.

Of states in a position of dependence, a distinction must be drawn between those under suzerainty and those under protection. A state under suzerainty is one which being part of the suzerain state has acquired certain of the attributes of international independence:<sup>3</sup> the presumption being that in all other respects it remains dependent. Its subjects are the subjects of the suzerain and it is at war if the suzerain is at war. Its position, in fact, does not differ in international theory from that of an individual state in a federal system.

Since the dissolution of the Holy Roman Empire in 1806, states under suzerainty have become rare, and have been chiefly to be found in the Turkish Empire, where Moldavia, Wallachia<sup>4</sup> and Serbia, in 1836, at the Treaty of Paris, succeeded in throwing off practically the whole of the authority of the Porte before they were declared by the Treaty of Berlin in 1878 to be independent states.<sup>5</sup>

#### Korea.

An instance is, however, to be found in the case of Korea,<sup>6</sup> which was under the suzerainty of China, till the denial of China's claim by Japan and the Chino-Japanese war of 1894-5. After that date, Korea was recognised as an independent state by the Treaty of Shimonoseki in 1895, and by an agreement between Japan and Great Britain and a declaration by Russia in 1902. This recognition was, however, of an illusory character, as Russia shortly afterwards placed troops in the country and established what was in effect a protectorate (of which Japan had a nominal share), and the complicated character of the situation was one of the main causes of the Russo-Japanese

<sup>1</sup> Westlake, Part I, p. 35.

<sup>2</sup> *Ibid.* p. 36.

<sup>3</sup> Hall, 7th ed. p. 29.

<sup>4</sup> In 1861 Moldavia and Wallachia were formed into one principality, viz. Rumania.

<sup>5</sup> Sir T. E. Holland, *European Concert in the Eastern Question* (Oxford, 1895), pp. 251-253, 297-303.

<sup>6</sup> See Smith and Sibley, *International Law as interpreted during the Russo-Japanese War*, 2nd ed. p. 19.

war, at the beginning of which Japan, while ostensibly guaranteeing Korea's independence, in effect seized the country by force, and stipulated for power to make it the theatre of military operations. But the position of Korea during this period was too abnormal and too temporary to justify any classification according to the ordinary rules of international law, and the final annexation of the country by Japan in 1910 made little if any substantial alteration in its situation.

The international position of Egypt was for a long time Egypt. curious. Nominally under the suzerainty of the Porte, it had in fact become a part of the British Empire; and the permanence of the British occupation was placed beyond doubt. Egypt of late possessed hardly a single element of international character, and neither the outward deference paid to European susceptibilities nor the shadow of control enjoyed by the international courts could disguise the real facts. The British position in the country was reinforced and more thoroughly regularised by the Anglo-French Agreement of April, 1904, whereby France renounced her demand for the withdrawal of Great Britain. Later, other powers formally recognised the occupation. Egypt continued, however, to retain an anomalous international status, which was not definitely removed till the Great War. The following announcement was made by the Foreign Office, December 17, 1914: 'His Britannic Majesty's Principal Secretary of State for Foreign Affairs gives notice that, in view of the state of war arising out of the action of Turkey, Egypt is placed under the protection of His Majesty, and will henceforth constitute a British Protectorate. The suzerainty of Turkey over Egypt is thus terminated, and His Majesty's Government will adopt all measures necessary for the defence of Egypt and the protection of its inhabitants and interests.' Abbas Hilmi Pasha, the Khedive, was deposed, and Prince Hussein Kamel Pasha, the eldest living prince of the family of Mehemet Ali, was put in his place with the title of Sultan of Egypt.<sup>1</sup>

Whether the relations between the late South African South  
African  
Republic. Republic and Great Britain could be properly described as those of 'suzerainty' or not, is a mixed question of history and political science with which we are not called upon to deal. It is, however, important to notice that facts which were not and could not be disputed were fatal to any claim by that Republic to international independence. A nation cannot

<sup>1</sup> See further Phillipson, *International Law and the Great War* (London, 1915), chap. xvi.

indefinitely surrender the treaty-making power to another,<sup>1</sup> and at the same time retain its existence as a sovereign state.

Protector-  
ates.

A protected state on the other hand is one which being *prima facie* independent has surrendered part of its rights to the protector; the presumption being that in all other respects it remains independent. Its subjects owe no allegiance to the protector, and it may be neutral while the protector is at war. The case of a protectorate sometimes raises nice questions; here it is evident that the view taken must depend on the degree of intimacy subsisting between the protecting and the protected states. A convenient evasion of the difficulty describes the position of the protected state as one of qualified or imperfect personality. During the Crimean War the Ionian Islands were under the protectorate of Great Britain. The case is a strong one, because the internal and external affairs of the islands were both controlled by this country, yet their neutrality was scrupulously respected throughout the war.<sup>2</sup> The explanation may be that the immunity from attack was conventional, for agreements were concluded by this country with Austria, Russia and Prussia, and that the effect of these conventions reacted upon the decisions of prize courts. It is certain that such a neutrality would not be respected for a moment if the protecting state derived any belligerent advantage from its occupation. It is not obvious that any characteristic attribute of personality survives to a state whose executive and foreign relations have passed into other hands, and it might be less misleading to note the claim to neutrality as exceptional, than to magnify a *scintilla juris* by such a description as imperfect personality. It may be further observed that if one of two belligerents were likely to derive any advantage from attacking a state, protected and controlled internally and externally by the other, it is not clear on what principle he would be bound to abstain from doing so; the protected state has made a surrender of all that is essential to national character, and the claim to respect an independence which has become purely nominal is little likely to impress practical statesmen.<sup>3</sup> Korea, for instance, as we have already pointed out, though at the

<sup>1</sup> By the Convention of London in 1884, Art. 4, the Transvaal Republic agreed to make 'no treaty with any state other than the Orange Free State, nor with any native tribe east or west of the Republic, without the approval of Great Britain.'

<sup>2</sup> *The Ionian Ships* (1855), 2 Spinks, 212. Cf. Wheaton (ed. Phillipson), p. 54; W. Forsyth, *Cases and Opinions on Constitutional Law* (London, 1869), p. 472.

<sup>3</sup> Cf. *The Cherokee Nation v. State of Georgia* (1821), 5 Peters, 1.

Ionian  
Islands.



time nominally an independent but in fact a protected state, was made a battle-ground during the Russo-Japanese War: a position entirely inconsistent with all theories of independence and neutrality.

The word 'protectorate' is also used to describe those assumptions of limited control over, without actual occupation of, the territory of uncivilised tribes, which are a notable feature of the modern partition of Africa. With these protectorates, international law is concerned in that the claim of the protecting state is generally recognised as debarring other states from interference, as laying upon it a correlative responsibility for the security of the subjects of other states within the protected area, and as imposing on the subjects of other states the duty of submitting to the jurisdiction of the protecting state within that area;<sup>1</sup> and according to the German view, which will probably become universal, the native subjects of the protected area are to be treated, when temporarily in other territory, as the subjects of the protecting state.<sup>2</sup> But the rules of law on this question are in a vague and indeterminate condition, and much will depend upon the circumstances of each particular case; and in many cases the control of the protecting state involves so large an interference with the internal affairs as well as the external relations of the native state as to amount practically to occupation. A Conference of the powers at Berlin, in 1884-5, agreed that the assumption of a protectorate in Africa should be notified to the other powers.<sup>3</sup>

A state may be under the protection of another state without formally surrendering any of its control over foreign policy; and without therefore becoming in the proper sense of the term a protectorate. Such was the position of San Marino, which was successively under the protection of the Pope and of Italy,<sup>4</sup> and in the same category was the little principality of Monaco, though it is now an unprotected state.

To describe as protectorates the native states of the Indian Empire seems to be a misuse of the term.<sup>5</sup> In theory

<sup>1</sup> Hall, 7th ed. p. 127; Westlake, *Chapters on the Principles of International Law* (Cambridge, 1894), p. 184 [reprinted in his *Collected Papers* (Cambridge, 1914)]; *International Law*, Part I, pp. 126, 127; and cf. The Foreign Jurisdiction Act, 1890-1, which is believed, with good reason, to be consistent with the exercise of jurisdiction over all persons in protected areas: a jurisdiction which was assumed by British Orders in Council in 1891, 1893, and 1894.

<sup>2</sup> Hall, 7th ed. p. 129.

<sup>3</sup> Art. 34 of the General Act of the African Conference of Berlin.

<sup>4</sup> Westlake, Part I, p. 23.

<sup>5</sup> See Sir W. Lee-Warner, *The Native States of India* (1910); Westlake, *Chapters*, etc., chap. x; in *Collected Papers*, pp. 194 seq.



independent, these states are in fact subject to an ultimate jurisdiction on the part of the British Crown, and are for all practical purposes part of the British Empire and therefore not within the purview of international law. In 1891 the Indian Government declared that 'the principles of international law have no bearing upon the relations' between itself and the native states under the suzerainty of the Queen-Empress.<sup>1</sup>

Personal  
unions and  
federal sys-  
tems.

In the case of a personal union, such as that which subsisted between Great Britain and Hanover from 1714 to 1837, the states so connected 'are properly regarded as wholly independent persons who merely happen to employ the same agent for a particular class of purposes, and who are in no way bound by, or responsible for, each other's acts.'<sup>2</sup>

International law therefore takes cognisance of them as separate states and disregards their union. In the case of a federal system on the other hand, international law takes cognisance only of the union and disregards the separate states. Here the constituent states of the federation have surrendered to a central authority the entire control of their foreign relations; they thus form a *Bundesstaat*, of which the most notable examples are the United States of America, and Switzerland.<sup>3</sup>

Confedera-  
tions.

In a confederation or *Staatenbund* the constituent states have surrendered to the central authority only a part of the control of their foreign relations; the great example of this kind of union being the German Bund, which existed from 1815 to 1866, in which the various states retained to themselves certain rights of receiving and accrediting ministers and of making treaties and alliances.<sup>4</sup> The distinction between a *Bundesstaat* and a *Staatenbund* is often very narrow; the latter, as in the case of the Swiss Confederation, sometimes prepares the way for and shades off into the former; and the German Empire of the present day, though for all practical purposes a *Bundesstaat*, nevertheless retains, in certain diplomatic rights belonging to some of its states, faint traces of the character of a *Staatenbund*.<sup>5</sup>

At the other end of the scale are those unions of independent states, which have merely by temporary and revocable conventions submitted to a partial limitation of their freedom of

<sup>1</sup> As to the position of their rulers in relation to the British courts of law see *Statham v. Statham and the Gackwar of Baroda*, L.R. [1912], P. 92.

<sup>2</sup> Hall, 7th ed. p. 24.

<sup>3</sup> See Wheaton (ed. Phillipson), pp. 80-86.

<sup>4</sup> Wheaton (ed. Phillipson), pp. 74 seq.

<sup>5</sup> *Ibid.* p. 79.

action. The ruling analogy is that of an ordinary alliance, such as the Triple Alliance, which, being freely contracted between sovereign states, does nothing to impair their sovereignty. Whether any particular union is of this kind or limits and qualifies sovereignty is in each case a question of fact.

(iii) The society must exhibit reasonable promise of durability. Promise of durability.

The promise of durable existence must obviously precede international recognition; and such recognition, though not necessary to establish the sovereignty of a state in relation to its own subjects,<sup>1</sup> is necessary before its international sovereignty is complete. The question when such recognition ought to take place becomes pressing when a new state is called into existence. Such new birth usually takes place in one of four ways:— Birth of states.

1. Previously uninhabited districts are colonised, and a political society is organised in them.
2. Associations of men originally non-political change their character, and form themselves into a state.
3. A state hitherto dependent or semi-dependent is recognised as independent, or its independence is guaranteed by the other members of the family of nations.
4. A people hitherto dependent on another asserts its independence by a successful revolt.

Instances of the first mode will occur at once; the cases of the Congo Free State and the Barbary States will illustrate the second; and for the third the somewhat doubtful illustration of Korea (before its annexation by Japan) may be given, and the equally doubtful instances which will be mentioned later in the paragraph on neutralisation.<sup>2</sup> There is, however, no reason in principle why a completely sovereign state should not come into being in this way, and the Congo Free State may perhaps be quoted as an instance of this kind of birth, besides being referred to under the second heading.<sup>3</sup>

It was a phenomenon to which it is difficult to find a parallel in history. Composed of individual citizens of various states, with the King of the Belgians at its head, the The Congo Free State.

<sup>1</sup> *M'Ilvaine v. Cox's Lessee*, (1808), 4 Cranch, 212.

<sup>2</sup> See *infra*, p. 66.

<sup>3</sup> As to the origin of the Congo Free State, see an article by J. S. Reeves, in *Amer. Journ. of Int. Law* (1909), vol. iii, pp. 99 *seq.*

International Association of the Congo was dependent upon no state. It secured concessions and occupied territory, and within six years from its formation in 1879 it had obtained recognition as an independent Government from all the important nations of the world. In 1884-5 a number of conventions and declarations were established whereby the boundaries of the new international person—designated the Congo Free State—were delineated, and its independence was formally recognised by the representatives of the various states participating in the West African Conference, held at Berlin (1884-5).<sup>1</sup> In 1888 the King of the Belgians (Leopold II) became its sovereign, the Belgian Parliament taking particular care that between it and Belgium there should be nothing more than a personal union; and from that time the Congo Free State was in effect part of his private domain. In 1889 he made a will bequeathing it to Belgium (thereby violating a rule laid down by some writers that a king may not dispose of his kingdom),<sup>2</sup> and the question of its annexation during his life, first raised in 1895, was not settled till 1908, when the country was taken over by Belgium.<sup>3</sup> From all inquiry into the moral conduct of this remarkable state international law is fortunately relieved. It may be added that Great Britain and the United States refused to recognise the annexation by Belgium, unless a guarantee were given for the better treatment of the natives of the territory; but Germany objected to such refusal, on the ground that it implied a claim to interfere in the internal affairs of an independent state.

Declaration  
of independ-  
ence.

It is in the fourth case that international difficulties have been most seriously felt. The gulf between the declaration of independence and its vindication is often considerable: at what point may the claim to national existence be recognised by a genuinely indifferent neutral? The principle is as clear as its application is sometimes difficult. The definitiveness of a new accession to the family of nations may be recognised by neutrals when it has become reasonably evident that the attempt to subdue the revolt is doomed to permanent failure. The recognition of the American Colonies by France in 1778 was an unfriendly act, inasmuch as the issue of the attempt to subdue them was still highly doubtful; on the other hand, the caution which the United States and Great Britain showed in admitting the claims of the revolting Spanish American

<sup>1</sup> The 'General Act of the Conference of Berlin concerning the Congo' was signed by fourteen states.

<sup>2</sup> Cf. Hall, 7th ed. pp. 91, 92.

<sup>3</sup> See *Annual Register*, 1908, p. 342.



colonies, in the early part of the last century, furnishes an instructive instance of correct deliberativeness. The recognition may take place formally by treaty, or informally by the interchange of diplomatic representatives.<sup>1</sup>

A clear distinction must be drawn between the recognition of independence and the recognition of belligerency. The latter may take place at a much earlier period than the former; indeed so soon as the insurgents are found to be carrying on what is, in fact, a war which affects the interests of the recognising power. Great Britain recognised the belligerency of the Confederate States little more than a month after the outbreak of hostilities. The United States have claimed that this was unjustifiable; but the existence of a state of war had already been in effect admitted by a declaration of blockade by the Northern States, and it is now generally conceded that the action taken by the British Government was correct.<sup>2</sup>

(iv) The society must possess fixed territories which must be reasonably large in extent. Possession of definite territory.

The framework of international law was formed at a time when men's minds were dominated by territorial ideas, and practice has grafted no exception on the above requirement. A nomadic people could offer no security for the fulfilment of its obligations, and in fact there would be little temptation to form contracts with it.

It is immaterial that the territory varies in extent from time to time, so long as such variation does not affect the power of a state to fulfil its international obligations. The expansion of Sardinia into the Kingdom of Italy was not regarded as affecting existing treaties;<sup>3</sup> and a reduction in size, so long as an essential part remains, will not obliterate a state's identity, though it may affect, of course, its power to carry out the terms of certain classes of treaties, such as those of guarantee or alliance. That the territories must be reasonably large is obvious. A community like the Pitcairn Islanders<sup>4</sup> may be quite civilised and may be left in the enjoyment of a peaceful independence, because it is not worth while to trouble them; but they can hardly be treated as an international state. Moreover, principalities like Monaco and Lichtenstein, and small republics like San Marino (38 square miles) and Andorra (175 square miles) are independent com-

<sup>1</sup> Cf. Sir W. Harcourt, *Letters of Historicus*, Nos. i, ii, and iii.

<sup>2</sup> Wheaton (ed. Phillipson), pp. 42, 43.

<sup>3</sup> Hall, 7th ed. p. 217.

<sup>4</sup> They are now, in fact, incorporated in the British Empire.



munities and enjoy in a certain measure the status of international personality, but they cannot be considered as members of the family of nations; they were not invited to send representatives to the Hague Peace Conferences, 1899 and 1907.

Membership  
of society  
of nations.

(v) The society must be a member of the family of nations.

It is difficult to indicate with precision the circumstances under which such admission takes place in the case of a nation formerly barbarous. One important requisite is that a state shall be under a system of law which gives to strangers and natives a reasonable approach to equality of treatment. The assimilation of European ideas, the growth of humane habits, the frank attempt to break down the barriers of exclusion, all these will insensibly prepare the way. Japan has fully established her claim to be recognised as a subject of international law. She acceded to the Geneva Convention in 1886; European nations have abandoned their extra-territorial privileges in her territory; she has attained to a high standard of conduct in warfare, from which she has only once fallen away;<sup>1</sup> she was a party to all the Conventions of the Second Peace Conference of 1907; her procedure at the Conference of London in 1908-9 was based upon a view of International Law which was marked by profound and careful study and a lofty sense of humanity; and since her war with Russia she has taken her place beyond question among the greater powers. In the case of China, there is more doubt, for it is not yet proved to what extent her troops can be brought to obey the rules of civilised war. In 1899, though summoned to the Peace Conference, she did not sign the Convention relative to the laws and customs of land warfare; but eight years later all hesitation in that respect had disappeared, and she was a party to all the Conventions of 1907. Precipitancy in admission is to be deprecated, and it is food for reflection that the Treaty of Paris in 1856 admitted Turkey to share in the advantages of the system of Europe, even though the Capitulations which exempted foreigners from Turkish jurisdiction were allowed to remain in force. Afghanistan is admittedly a fully sovereign state; but by reason of the fact that it is not yet considered to be within the pale of civilisation, it has not hitherto been recognised as a member of the international community.

<sup>1</sup> In 1894 Japanese troops indulged in a five days' massacre of all Chinese men, women and children in Port Arthur; but conduct hardly less disgraceful was proved against European troops during the advance upon Peking in 1900.

In international as in municipal law the subjects are con- Theory of  
ceived of as equal. The equality of all citizens before the law equality.  
is axiomatic in civilised systems, and the doctrine has received  
much verbal allegiance from statesmen on the larger stage of  
international relations. Sir Henry Maine<sup>1</sup> traces its origin to  
the old confusion between *jus gentium* and *jus naturæ*. If the  
society of nations is governed by natural law, the elements which  
compose it must be absolutely equal. Men under the sceptre  
of nature are all equal, and accordingly commonwealths are  
equal if the international state be one of nature. 'The pro-  
position that independent communities, however different in  
size and power, are all equal in the view of the law of nations,  
has largely contributed to the happiness of mankind, though  
it is constantly threatened by the political tendencies of each  
successive age.'<sup>2</sup>

The influence for good which Sir H. Maine attributes to  
the theory of equality is a striking instance of the effect of  
idealism on the world's history. Nothing can be more certain  
than that the theory, in municipal law truistic, is, when applied  
to the position of states, inept and misleading. When we  
affirm that in England all men are equal before the law, we  
mean that the meanest peasant may litigate in equal terms  
with a powerful nobleman; what place can such a theory have  
in a system of self-redress? Can it be said without absurdity  
to a small state injured by a great one, 'Your cause is just;  
be not concerned at the poverty of your resources; in inter-  
national disputes all states are equal; war, however, is the  
only litigation we know, and equality ends when you enter  
its court'?

The fiction has no doubt reacted upon international senti-  
ment, and in this way prevented much wrongful aggression;  
but it must be noted that it has little correspondence with the  
facts of international life, and that in the rough-and-ready  
practice of nations suit *in formâ pauperis* is not a hopeful  
procedure. The kingdom of Greece having been created in  
1832, by England, France and Russia, with the assent of  
Austria and Prussia, can hardly claim any real equality with  
its creators; and all its history has been moulded by them  
even to the extent of their prohibiting it, by a pacific blockade,  
from making war<sup>3</sup> and dictating to it terms of peace.<sup>4</sup> Turkey  
has repeatedly been compelled to submit to the dictation of

<sup>1</sup> *Ancient Law* (ed. Pollock, 1906), pp. 103 seq.

<sup>2</sup> *Ibid.* pp. 103-104.

<sup>3</sup> In 1886.

<sup>4</sup> In 1897, at the end of the war between Greece and Turkey.

the Concert of Europe, which has long assumed a general superintendence over the destinies of the whole continent;<sup>1</sup> while on the continent of America, the United States, with the Monroe doctrine as her chief weapon, has taken up a somewhat similar position, without, however, interfering over-much in the quarrels of the various South American States.

However this may be, the doctrine of equality—inapplicable as it is when self-redress is the means of seeking reparation for injuries suffered—has frequently been applied in practice, when redress has been sought before a court of arbitration. In such cases the arbitrators were bound in the interests of justice and equity to regard the contending states as equal and to pronounce in favour of the one that had right, and not strength, on its side. Furthermore, the doctrine of equality will receive full application in the event of the establishment of an International Court of Justice.

Again, there is a negative aspect of the doctrine of equality which is recognised by modern international law, viz. that relating to the sovereignty and independence of states, and therefore to the duty of non-interference with their internal affairs. The cases of intervention that have occurred have been due to the desire to regulate external relationships, *e.g.* in the case of Turkey and Greece. This sense of equality has been thus described by Marshall, C.J., nearly a century ago: 'Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate for itself alone.'<sup>2</sup>

Neutralised  
states.

The state of neutralisation illustrates an abnormality of type in international character which may most conveniently be considered here. A neutralised nation is one which is prohibited indefinitely, or for a considerable period, from carrying on war except in its own defence, and from entering into such political engagements with other states as might endanger its neutrality in the event of war; in return its neutrality or the inviolability of its territory is guaranteed by the great powers. It is, so to speak, bound over to keep the peace; and the undertaking is not regarded as impairing its sovereignty. The prohibition must proceed from the general body of nations, for a particular state cannot of its own accord cut itself adrift from the ordinary incidents of international char-

<sup>1</sup> Cf. Lawrence, pp. 269 *seq.*

<sup>2</sup> *The Antelope* (1825), 10 Wheaton, 66, at p. 122.



acter.<sup>1</sup> Neutralisation is easily distinguished from neutrality. It is normally permanent, general and involuntary, whereas neutrality is temporary, particular and voluntary. Neutralisation necessarily involves neutrality, but neutrality does not necessarily involve neutralisation.

The three instances of neutralisation usually cited are those of Switzerland, Belgium and Luxemburg. In 1815 Great Britain, Austria, France, Prussia and Russia asserted the perpetual neutrality of Switzerland, and pledged themselves to maintain the integrity of its territories. In the treaties of 1831 and 1839 the same powers asserted the independence and neutrality of Belgium.<sup>2</sup> Both countries have scrupulously observed the conditions of their peculiar position, and no attempt has been made to violate the independence of either, until in 1914 Germany, disregarding her obligations, violated the neutrality of Belgium by a deliberate invasion of her territory.<sup>3</sup> It is noticed by Mr. T. J. Lawrence<sup>4</sup> that Belgium was not permitted to assent to the neutralisation of Luxemburg in 1867, on the ground that such assent involved the assumption of responsibilities inconsistent with her own international limitations. A practical question is suggested by the dispute between Prince Bismarck and the inhabitants of Luxemburg during the Franco-Prussian war, who were accused by him of affording to France assistance which was inconsistent with neutrality: what is the remedy against a neutralised state for a refusal to redress international injuries? In strictness the aggrieved party should lay his complaint before the guaranteeing powers and request them to procure satisfaction; in practice he would probably take this course, reserving a claim to act for himself if satisfaction were not forthcoming. If the occasion called peremptorily for immediate redress, it can hardly be doubted that a powerful nation would take the law into its own hands.<sup>5</sup> In 1914, however, German troops invaded Luxemburg (as well as Belgium), brought in armoured trains and munitions of war,

<sup>1</sup> The Congo State, in 1885, added to the anomalies of its position by declaring itself to be perpetually neutral; but it may be said, perhaps, that the situation was made regular by the assent of the powers (Westlake, *International Law*, Part I, p. 30).

<sup>2</sup> See Phillipson, *International Law and the Great War*, pp. 6 seq. A detailed account of the neutralisation of Belgium is to be found in E. Descamps, *La Neutralité de la Belgique* (1902).

<sup>3</sup> See Phillipson, *op. cit.* pp. 11 seq.; J. W. Garner, in *Amer. Journ. of Int. Law*, vol. ix (1915), pp. 72 seq.

<sup>4</sup> *International Law*, p. 600.

<sup>5</sup> Bismarck threatened to disregard the neutrality of Luxemburg on the occasion referred to in the text.



seized the government offices of the Grand Duchy, and cut the telephonic communication; in the case of both countries the German authorities claimed to act, not on the ground that immediate redress was indispensable, but on the ground of military necessity.<sup>1</sup>

Neutralisation of things other than states.

This operation of neutralisation can be applied to things other than states. In 1888 the Suez Canal was by a general agreement (viz., the Treaty of Constantinople) declared to be open at all times to all vessels, but so that no acts of hostility were to be committed in it, or within three miles of either end of it; with a prohibition against the blockade of either end of it, and against the presence of any belligerent vessel in its harbours for more than twenty-four hours.<sup>2</sup> The Panama Canal was neutralised (internationalised) on a somewhat similar basis by the Hay-Pauncefote treaty, 1901.

How persons may be neutralised will be seen when we deal with the provisions of the Geneva Convention of 1864.

Further, attempts have been made to neutralise a part only of a state, with what effect in practice remains yet to be seen. In 1815, at the second Peace of Paris, it was agreed that a part of Savoy,<sup>3</sup> which then belonged to Sardinia, should 'form a part of the neutrality of Switzerland,' Sardinia, if at war, being bound to evacuate the country and leave it to be garrisoned by neutral Swiss troops. On the transfer of Savoy from Sardinia to France in 1860, no definite agreement of all the powers was arrived at, but France in a vague way admitted a similar obligation; though it is with good reason doubted whether a state at war with France would be willing to treat as neutral, and therefore exempt from invasion, a territory which supplied France with troops and money. In the Franco-German war, there was no evacuation by France of Savoyard territory; and no question on the subject arose.<sup>4</sup>

<sup>1</sup> See Phillipson, *op. cit.* pp. 19 *seq.*, 27 *seq.*

<sup>2</sup> *British State Papers, Egypt*, No. 2 (1889). In some respects, however, 'internationalisation' is a more appropriate term than 'neutralisation' to describe the status of the Suez Canal. Cf. Lord Cromer, *Modern Egypt* (London, 1908), vol ii, p. 384.

In 1915 it was held by the Prize Court sitting at Alexandria, that the Suez Canal Convention does not protect from capture vessels using the ports of the canal not for purposes of passage, but as places of refuge: *The Gutenfels* (1915), 1 P.C. 102; *The Barenfels* (1915), 1 P.C. 122; *The Pindos* (1915), 1 P.C. 248; affirmed by the Privy Council: *The Pindos*; *The Helgoland*; *The Rostock* (1916), 2 P.C. 146. If a prize stays beyond the twenty-four hours, that fact is not cognisable by the Prize Court as a ground for the release of the prize: *The Sudmark* (1917), A.C. 620.

<sup>3</sup> Wheaton (ed. Phillipson), pp. 632, 633; Lawrence, pp. 601-603.

<sup>4</sup> Corfu and Paxo were similarly neutralised when the Ionian Islands were transferred to Greece in 1864. Cf. Holland, *European Concert in the Eastern Question*, pp. 45 *seq.*

From what has been said above, it will be clear that, strictly speaking, chartered companies have no claim whatever to international status.<sup>1</sup> The facts perhaps are hardly so clear as the theory. These great corporations have played a part so extraordinary in the history of the world, they have exercised jurisdiction of so high a kind, and with such immunity from supervision, that it is impossible to put them on one side with the observation that they are merely trading companies, and that their character is therefore extraneous to the subject of international law. A juster, and certainly a more convenient, view, is to conceive of a chartered company of the normal type as enjoying a delegation of sovereign power over a defined area. The terms of the delegation concern only the company, and the nation whence the authority proceeds. It is sufficient to third parties to know that a political act of the company is *primâ facie* the act of the country to which it belongs, and that redress may be sought from that country for wrongs done by the company.<sup>2</sup> So much seems to be involved in general principle. A nation cannot commit political functions to associations of its citizens, and then disclaim responsibility for their abuse. The degree of satisfaction is very likely to vary according to the position of the injured party, but it is hardly credible that a first-class power injured by a chartered company would acquiesce in a lower degree of satisfaction from the accrediting state than if the latter had directly been the aggressor. The temptation to employ chartered companies is obviously great. The administration of the East India Company was stained by much that was discreditable, but it none the less rendered splendid service to this country, and perhaps in the long run to humanity as well. Yet the objections must not be overlooked. Many of the defects in company government pilloried by the noble eloquence of Fox and Burke were no doubt particular and accidental, but some of them are permanently inherent in the system. Government by chartered company necessarily subordinates the social organism of the district under control to trading considerations. In no other branch of English public law would a Government be tolerated which avowedly existed for purposes of exploitation. It is undoubtedly true that

<sup>1</sup> Among modern corporations possessing a status more or less analogous to that formerly held by the East India Company we may mention the following: the North Borneo Company, incorporated by Royal Charter in 1881; the British East Africa Company, 1888; the New Guinea Company of Berlin, 1885; and the German East Africa Company, 1888.

<sup>2</sup> Cf. *The Secretary of State for India v. Sahaba* (1859), 13 Moo. P.C. 22.

pioneer work of incalculable value has been done by such companies in the past, and occasions may recur when their employment is the least of competing evils, but imperial and economical tastes are not gracefully associated, and the era of chartered companies should at most be a phase in the work of reclamation.

The Papacy. Till 1870 the Papacy possessed temporal sovereignty, in addition to its spiritual authority over the Roman Catholic Church, and therefore was invested with international personality. In that year an Italian army occupied Rome, which became the capital of the kingdom of Italy; and so the temporal status of the Papacy disappeared with the dissolution of the Papal States. The Law of Guarantees, enacted by the Italian Parliament in 1871, regulated the position of the Pope, and assured him various high privileges and immunities. Certain states dispatch to him and receive from him envoys, who enjoy many rights conferred on ambassadors, but possess the character of ecclesiastical officials rather than that of diplomatic representatives. He is entitled to enter into concordats with foreign states, but they are not treaties within the meaning of international law. Being deprived both of territory and temporal subjects, he is divested of international personality, and therefore possesses no international rights and is not subject to international obligations (other than those of an ecclesiastical nature established by the concordats). He was not invited to send representatives to such international assemblies as the Hague Conferences of 1899 and 1907. Having regard, however, to the fact that many states regard the Pope as possessing various privileges incidental to sovereignty, his international status is therefore somewhat anomalous.<sup>1</sup>

<sup>1</sup> Cf. Westlake, *Int. Law*, Part I, pp. 37 *seq.*; L. Oppenheim, *International Law*, 2 vols. (London, 1912), vol. i, §§ 104 *seq.*; F. Despaget, *Droit international public* (Paris, 1910), §§ 147 *seq.*; H. Bonfils, *Droit international* (Paris, 1912), §§ 370 *seq.*



## CHAPTER III

### THE REPRESENTATIVES OF STATES IN FOREIGN COUNTRIES

THIS subject is generally considered under the head of international rights: an arrangement supported by a supposed right of legation. The claim appears somewhat academic; in theory one state could hardly insist that another should accredit ambassadors to it, or receive them from it. No doubt the withdrawal of an ambassador usually precedes an outbreak of war; but antecedent differences and not the withdrawal are the *causæ causantes* of the war, and instances have occurred of an ambassador being withdrawn (as when Sir Henry Bulwer was withdrawn from Madrid in 1848) without more serious consequences than a temporary suspension of diplomatic relations. On the other hand, no two states could in practice permanently refuse to interchange representatives in time of peace; such intercourse is imperatively demanded by mutual convenience.

It is only in exceptional cases and for special reasons that a state can justly decline to receive an ambassador, as being a *persona non grata* on personal or political grounds. There may be personal objections to him, as in the case of the Duke of Buckingham, whom the French Court refused to receive when sent by Charles I,<sup>1</sup> because he had posed, during a prior visit to the court, as a lover of the queen;<sup>2</sup> or he may have expressed views on the affairs of the nation to whom he is accredited, which make him liable to a suspicion of political partisanship, or otherwise unacceptable, as in the cases of Mr. Keiley and Italy,<sup>3</sup> and of Mr. Blair and China. The former had in a public speech expressed strong views against the destruction of the temporal power of the Papacy, and therefore could not be considered an acceptable representative by Italy, which had effected this destruction; the latter was believed to have expressed views very hostile to the presence of Chinese in America.<sup>4</sup> States may also refuse to receive an ambassador

Refusal to receive.

<sup>1</sup> Cf. also the case of Cardinal Pole (Woolsey, *International Law*, 5th ed. p. 135).

<sup>2</sup> See S. R. Gardiner, *England under the Duke of Buckingham and Charles I*, vol. i, pp. 182, 183, 329.

<sup>3</sup> J. B. Moore, *Digest of International Law*, 8 vols. (Washington, 1906), vol. iv, p. 480.

<sup>4</sup> Moore, *Digest*, vol. iv, p. 484.



from a state of whose sovereignty there is any doubt; and papal legates have been objected to by states that would not recognise the claim which their presence would imply of the sovereignty of the Pope.<sup>1</sup>

**Precedence.** The precedence of diplomatic and other agents resident in foreign countries was determined by the protocols of the Congress of Vienna in 1815 and the Congress of Aix-la-Chapelle in 1818. It is as follows:—

1. Ambassadors and papal legates or nuncios.<sup>2</sup>
2. Diplomatic ministers particularly accredited to sovereigns.
3. Resident ministers accredited to sovereigns.
4. Chargés d'affaires accredited to ministers for foreign affairs.
5. To the above list may be added those who discharge consular functions.<sup>3</sup>

Notwithstanding the nice gradations of this hierarchy, of which the ceremonial details need not concern us, a sufficient account of the subject can be given under the two heads of (1) Ambassadors; (2) Consuls.

### (1) Ambassadors

The despatch of ambassadors to foreign countries for special and temporary purposes was very frequently resorted to in ancient times; and their rights and privileges were generally recognised.<sup>4</sup> The practice of sending ambassadors to reside at foreign courts seems to date from the Reformation, and the institution was regularised and more definitely organised after the famous Peace of Westphalia (1648), which marked an important turning-point in the history of Europe. Before that time they were looked upon with suspicion. The passage from Coke has been often cited, in which he says that Henry VII of England was wise because he 'would not in his time suffer Lieger ambassadors of any foreign king or prince within his realm, or he with them, but upon occasion used ambassadors.'<sup>5</sup>

<sup>1</sup> Hall, 7th ed. pp. 308, 309.

<sup>2</sup> It has already been pointed out that papal legates and nuncios have since 1870 lost their status of public ministers within the contemplation of international law.

<sup>3</sup> For the classification of diplomatic agents, see Sir E. Satow, *A Guide to Diplomatic Practice*, 2 vols. (London, 1917), vol. i, pp. 229 *seq.*

<sup>4</sup> Cf. Phillipson, *Int. Law and Custom of Ancient Greece and Rome*, vol. i, pp. 303 *seq.*

<sup>5</sup> Fourth Institute, chap. 26.

So Grotius<sup>1</sup> affirms that a nation is not bound to receive resident embassies, for such are unknown to ancient practice; and the system clearly owes its existence to convenience and international courtesy rather than to any principle of law.

It has long been an established rule of international law that ambassadors and their suites ordinarily possess the right of inviolability, or exemption from inquiry, restraint, molestation, or interference. Such right is retained by them in the event of their withdrawal or dismissal until their return to their own country; so that if a war should break out between two states, the ambassadors of the one accredited to the other must be allowed to depart without molesting them or inflicting any personal indignity on them.<sup>2</sup> Inviolability.

It is often somewhat largely stated that an ambassador enjoys the privilege of extraterritoriality.<sup>3</sup> By this is, or should be, meant, that though *de facto* resident in the country to which he is accredited, his position *de jure* is regulated on the supposition that he still resides in his own country. This is by no means in all respects the case. An ambassador, for instance, cannot exercise, or cause to be exercised, judicial functions in the country to which he is accredited, and it is more accurate to say that certain immunities from the jurisdiction of municipal courts are conceded to ambassadors by the practice of nations. These exemptions, it is to be noted, apply even if the ambassador is a subject of the state to which he is accredited, unless that state on receiving him has specifically reserved its rights over him,<sup>4</sup> as it is entitled to do. They apply also, in general, to negotiators and representatives at a conference or congress, though such persons are not technically accredited to the state in which the meeting takes place.<sup>5</sup> Such immunities<sup>6</sup> may be considered under two heads:—

(a) Immunity from the criminal jurisdiction of the country to which the agent is accredited.

(b) Immunity from the civil jurisdiction of the country to which he is accredited.

(a) Under no circumstances may an ambassador be tried for a criminal offence in the country to which he is accredited.

<sup>1</sup> ii, 18, 3, cited by Woolsey, § 89.

<sup>2</sup> As to the practice in the Great War, in which these rules were not fully observed in every instance, see Phillipson, *International Law and the Great War*, pp. 69 seq.

<sup>3</sup> Satow, *op. cit.* vol i, p. 240.

<sup>4</sup> *Macartney v. Garbutt* (1890), 24 Q.B.D. 368.

<sup>5</sup> Westlake, Part I, p. 275, and cf. Convention XII of 1907, Art. 13.

<sup>6</sup> See Satow, *op. cit.* pp. 242 seq.

Immunity  
from  
criminal  
jurisdiction.

The practice is well settled, and has been established in England since the case of Mendoza, the Spanish ambassador, who conspired to dethrone Queen Elizabeth. Nor can he be arrested under ordinary criminal process;<sup>1</sup> he may, however, be arrested by a high assertion of sovereign power for intriguing against the country in which his mission lies. Thus Count Gyllenborg, the Swedish ambassador in 1717, was detained for some time in an English prison for plotting against the Hanoverian dynasty.<sup>2</sup> The French Government in 1718 arrested Prince Cellamare, the Spanish ambassador, on a similar charge.<sup>3</sup> The case of Pantaleon Sa<sup>4</sup> is hardly consistent with modern practice. Sa was the brother of the Portuguese ambassador accredited to the Commonwealth; under outrageous circumstances he, or men acting under his direction, killed one person and wounded several others, and for this offence he was indicted, tried, and executed.

The general view in later times is that the privileges of an ambassador are shared by his family living with him, and by his official and domestic suite;<sup>5</sup> though in England it has been claimed that a coachman of the United States minister is subject to the English courts if he commits an assault outside the embassy; and there can be little doubt that it is more convenient and in no way derogatory to an ambassador's rights to try such cases on the spot. Disputes on this point will usually be avoided by the ambassador giving his consent.

The correct course when an ambassador is suspected of criminal acts was indicated so long ago as 1584 in an opinion which Gentilis and Hotman were asked to give in Mendoza's case. He must be handed over to the authorities of his own country. The latter precedent was followed (1718) in the case of Cellamare, who was conducted to the frontier by a military escort.

The claim that an ambassador's house is a 'city of refuge' to criminals, which would be strictly involved in the extritorial theory, has long been generally abandoned in practice.<sup>6</sup>

<sup>1</sup> Case of the Dutch ambassador and the Landgrave of Hesse Cassel, 1763.

<sup>2</sup> C. de Martens, *Causes Célèbres*, i, 101.

<sup>3</sup> *Ibid.* i, pp. 139 seq.

<sup>4</sup> 5 Howell, *State Trials*, 460; Sir R. Phillimore, *Commentaries upon International Law*, ii, 211.

<sup>5</sup> See *Parkinson v. Potter* (1885), L.R. 16 Q.B.D. 152.

<sup>6</sup> Cases of the Duke of Ripperda and of Springer: De Martens, *Causes Célèbres*, i, 101; case of Mickilchenkoff (1867): Calvo, *Droit International*, vol. i, § 571. In 1896 the British Government insisted on the release of a Chinese refugee, who had entered the residence of the Chinese ambassador in London, and was there detained with a view to his being sent back to China for trial. Cf. the case of Waddington (son of the Chilean envoy in Belgium)



A diplomatic agent cannot be compelled to give evidence for the purposes of, or before, any court in the country of his sojourn; the immunity, however, is waived in a proper case,<sup>1</sup> and the refusal to do so has been held to justify a demand for the agent's recall.<sup>2</sup>

(b) With regard to civil jurisdiction, there seems to be a general agreement that an ambassador is exempt in respect of all his official or private contracts, and so much property, real or personal, as is 'necessary to his dignity or comfort';<sup>3</sup> but there is no fixed international agreement in cases where he engages in trade, or is a large property holder in the country of his sojourn, such cases, of course, being very rare. The English common law seems to have allowed no immunity from civil jurisdiction at all to ambassadors. There is a dictum in Coke against the claim, but the law apparently remained uncertain until 1708.

In that year the Czar's ambassador in London was arrested for a debt of £50.<sup>4</sup> A criminal information was entered against those responsible for the arrest. While the point of law was still under consideration, the statute 7 Anne, c. 12 was passed. The Act, which was in form declaratory, provided by section 3, 'That all writs and processes that shall at any time hereafter be sued forth or prosecuted whereby the person of any ambassador . . . of any foreign prince . . . received as such by her Majesty, or the domestic servant of such ambassador . . . may be arrested or imprisoned, or his goods or chattels be distrained . . . shall be deemed utterly null and void.' By section 4, attorneys suing such processes were made liable to punishment. Section 5 provides that the immunity of an ambassador's servants is forfeited by their occupation in trade. On this statute it has been held<sup>5</sup> that a person claiming the benefit of this Act as domestic servant to a public minister who killed the secretary of the legation (1906); the envoy having waived his privilege, Waddington was arrested, tried and acquitted: *Rev. gén. de dr. int. pub.* (1907), vol. xiv, pp. 159 seq. See also *infra*, p. 76.

<sup>1</sup> The privilege was waived in 1880 by the Venezuelan minister to the United States, Señor Comancho, who was present at the assassination of President Garfield. Conformably to the instructions received from his Government, he appeared as a leading witness at the trial of the assassin.

<sup>2</sup> Halleck, *International Law*, ed. Sir G. S. Baker (1908), vol. i, pp. 359, 360; Moore, *Digest*, vol. iv, § 662. Thus in 1856 the Dutch minister to the United States having declined with the concurrence of his Government to give evidence in a case of homicide committed in his presence, the American Government considered the refusal as an act of discourtesy and hence requested his recall.

<sup>3</sup> Westlake, Part I, p. 277.

<sup>4</sup> Phillimore, ii, 228.

<sup>5</sup> *Fisher v. Begres* (1832), 2 C. & M. 240.

Immunity  
from civil  
jurisdiction.



must be really and *bona fide* the servant of such minister at the time of the arrest, and the matter in respect of which he claims immunity must be connected with such service.<sup>1</sup> The privilege is that of the ambassador, not of the servant.<sup>2</sup> This statute is a recognition of the principle, on which there is general agreement, of freedom from arrest and d restraint, either of which might hamper an ambassador in the exercise of his diplomatic functions, and it has been interpreted as meaning that not only can execution not issue, but an ambassador cannot be sued against his will,<sup>3</sup> and the Statute of Limitations does not begin to run against his creditors so long as he holds his office.<sup>4</sup> An ambassador who sues as a plaintiff thereby submits to the jurisdiction of the court, presumably in so far as his personal liberty and his property held in virtue of his office are not affected; and he becomes liable to plead to a counter claim or cross action, but will not be compelled to give security for costs.<sup>5</sup> Unlike a sovereign, however, he is bound by the police and administrative regulations,<sup>6</sup> and it would seem that any real property which he owns in his private capacity is subject to the jurisdiction of the state in which it is situate.

Ambassa-  
dor's house.

It is clear that to describe an ambassador's house<sup>7</sup> as part of the territory of his country is inaccurate, for a criminal who commits a crime or takes refuge there, can be surrendered without the formal process of extradition. The right of asylum is practically obsolete in Europe, Greece and Spain being the only countries in which it has been exercised of late years;<sup>8</sup> but it has by no means disappeared in the South American Republics. Whether the embassy can be entered by the local authorities without the ambassador's permission is a matter of doubt, and the practice of nations has varied. England has

<sup>1</sup> *Novello v. Toogood* (1823), 1 B. & C. 554.

<sup>2</sup> *Fisher v. Begres* (1832), 2 C. & M. 240.

<sup>3</sup> *Magdalena Steam Navigation Company v. Martin* (1859), 2 E. & E. 94. See also *Parkinson v. Potter* (1885), 16 Q.B.D. 152.

<sup>4</sup> *Musurus Bey v. Gadban* (1894), 2 Q.B. 352. Cf. *In re Republic of Bolivia Exploration Syndicate, Ltd.* [1914], 1 Ch. 139. See also *In re Francisco Suarez, Deceased, Suarez v. Suarez* (1917), where it was held that a minister accredited to this country by a foreign state, who has submitted to the jurisdiction of an English court down to judgment, and against whom judgment has been pronounced, is entitled under sect. 3 of the Diplomatic Privileges Act, 1708, when leave to issue execution is applied for, to assert and obtain immunity from process by way of execution.

<sup>5</sup> *Duke de Montellano v. Christian* (1816), 5 M. & S. 503.

<sup>6</sup> See P. L. Pradier-Fodéré, *Cours de droit diplomatique*, 2 vols. (Paris, 1881), vol. ii, 112-116; Moore, *Digest*, vol. iv, § 669.

<sup>7</sup> As to the immunities of the residence of a diplomatic agent, see Satow, *op. cit.* vol. i, pp. 282 *seq.*

<sup>8</sup> In 1862 and in 1873 respectively.

claimed the right to enter for the purpose of arresting an offender,<sup>1</sup> and all that can be said with confidence is that entry and search are justifiable in those extreme cases which justify an ambassador's arrest. The ambassador, his house and his official property, and in most cases all goods imported for his use,<sup>2</sup> are free from the payment of all taxes, rates,<sup>3</sup> or duties.

The United States Congress in 1890 passed an act of a similar scope<sup>4</sup> to that of the Statute of Anne, and continental practice has been almost uniformly favourable to the claim in its most generous form, though there is a substantial body of opinion in favour of the principle that an ambassador is subject to the jurisdiction of the country to the extent of his property other than property held in his official capacity, and particularly if he actually engages in trade.

Ambassadors do not enjoy exceptional privileges to the same extent at the hands of third states<sup>5</sup> or enemies. There is in a vague way a right of passage through the territory of friendly powers, which has however not always proved a protection from arrest for civil liabilities or criminal offences. Those who have in the past denied such protection have acted on such a rule as was formulated by Bynkershoek: 'Non valere jus legationis nisi inter utrumque principem qui mittit legatos et ad quem missi sunt.'<sup>6</sup> But later practice has leaned in favour of a relaxation of this rule to the advantage of diplomatic personages, on condition of their good behaviour and innocent passage through the territory of a third state. Thus it has been declared by an American Court,<sup>7</sup> that an ambassador in such circumstances was not only immune from arrest in the case of civil liabilities, but also exempt from all civil process sought to be instituted against him in a friendly country through which he was passing on his way to the scene of his mission. A similar view was adopted by an English Court,<sup>8</sup> which refused to allow service of a writ out of England on the minister of a friendly state accredited to a foreign country; *Manisty, J.*, was of the opinion that the

<sup>1</sup> Hall, 7th ed. p. 190.

<sup>2</sup> Up to the limit, as a rule, of a fixed sum (Wheaton (ed. Phillipson), p. 348).

<sup>3</sup> *Parkinson v. Potter* (1885), 16 Q.B. 152; *Macartney v. Garbutt* (1890), 24 Q.B.D. 368.

<sup>4</sup> Cf. *Dupont v. Pichon* (1805), 4 Dall. 321.

<sup>5</sup> As to the position of diplomatic agents in regard to third states, see Satow, *op. cit.* vol. i, pp. 317 seq.

<sup>6</sup> *De foro legatorum* (1720), c. ix, § 7; cf. Grotius, *De jure belli ac pacis*, ii, 18, 5. See Wheaton (ed. Phillipson), p. 349.

<sup>7</sup> *Wilson v. Blanco* (1889), 56 N.Y. Sup. Ct. 582; Scott, *Cases*, p. 206; following *Holbrook v. Henderson* (1851), 4 Sand. S.C. 626.

<sup>8</sup> *New Chile Gold Mining Co. v. Blanco* (1888), 4 T.L.R. 346.

privilege attaching to diplomatic agents would be violated by compelling an ambassador accredited to a foreign country to appear as a defendant in Great Britain.<sup>1</sup>

But a belligerent may undoubtedly intern the diplomatic agents of his enemy if found on his territory, even though they are on their way to a neutral state; he may not, however, take them from neutral territory or from a neutral vessel, as appeared in the *Trent* controversy.<sup>2</sup> A well-known instance of arrest was that of Marshal Belleisle (1744), the French ambassador, while on his way through Hanover, during the Franco-English war.<sup>3</sup>

The diplomatic agents of a neutral found on enemy territory must be treated with due regard for their inviolability, and, as a matter of international courtesy, their communication with their own Governments should not be interrupted; but it is doubtful whether their rights are such as to override an 'evident military necessity.' During the Franco-Prussian war, the United States protested against the refusal of the Germans to allow her minister in Paris to send dispatches to London in a sealed bag, but admitted that a refusal might be justified if such necessity were proved.<sup>4</sup>

Duties of  
diplomatic  
agents.

The duties which such agents owe to their own countries hardly concern us here, but are a branch of the public law of the state to which they belong. Ambassadors, however, are forbidden by rules which are most jealously enforced, from any association, direct or indirect, with the public affairs of the country to which they are accredited. Mr. Hall<sup>5</sup> collects the instances in which violations of this rule have been followed by a request to the accrediting state to recall, or in an extreme case by dismissal.

A well-known instance of dismissal occurred in 1888,<sup>6</sup> when Lord Sackville, the English ambassador at New York, was given his passports and required to leave the country within three days. Lord Sackville had been asked to advise an unknown correspondent of English extraction and sympathies how to vote in the Presidential election of that year. He replied suggesting in a general way that the then Government was friendly to this country, whereas Mr. Cleveland's intentions

<sup>1</sup> The views of international jurists are not unanimous on the question; the majority are against absolute inviolability; cf. *Annuaire de l'Institut de Droit international*, vol. xiv, p. 239.

<sup>2</sup> Cf. the Declaration of London (1909), Art. 47.

<sup>3</sup> De Martens, *Causes Célèbres*, i, p. 310.

<sup>4</sup> Hall, 7th ed. p. 321.

<sup>5</sup> 7th ed. pp. 315, 316.

<sup>6</sup> *Parl. Papers, United States*, No. 4 (1888), No. 1 (1889).



were unascertainable. The letter may have been an indiscretion, but, as Mr. Hall observes, 'it was treated as an open and international offence.'

In September, 1915, Dr. Dumba, the Austro-Hungarian ambassador in Washington, was recalled on the ground, first, that he had proposed plans to his Government for instigating strikes in American factories producing munitions of war, and secondly that he had employed an American citizen to carry official dispatches secretly to Austria through the lines of her enemies.<sup>1</sup>

## (2) Consuls

The term international agent should mean one who is a link in a chain of communication between two states. In this sense a consul is not, as such, an international agent. He is an official of the country for which he acts, intrusted with duties of a multifarious kind in a foreign country, and permitted by that country to discharge them within its borders. The permission involves certain privileges, the concession of which is somewhere along the border-line between courtesy and law. He has not, indeed, any immunity from the ordinary tribunals,<sup>2</sup> though their jurisdiction is asserted so as to inconvenience him as little as possible in the discharge of his duties. In the United States practice is similar,<sup>3</sup> though American policy has added considerably by treaty to the functions and immunities of the consular service.<sup>4</sup>

The liability of a consul to be arrested is inconvenient, and this sudden arrest might be very prejudicial to members of the state for which he acts. The point was considered in this country in the case of *Clarke v. Cretico*,<sup>5</sup> when Mansfield, C.J., observed: 'The office of consul is indeed widely different from that of an ambassador, but still the duties of it cannot be performed by a person in prison. . . . The words of the statute<sup>6</sup> are: "Ambassador or other public minister." But a consul is certainly not a public minister. In *Viveash v. Becker*<sup>7</sup> Lord Ellenborough summed up the matter as follows: "Nobody is disposed to deny that a consul is entitled to privilege to a certain extent, such as for safe-

Consul not an international agent.

Position of consuls.

<sup>1</sup> *Amer. Journ. of Int. Law*, vol. ix (1915), pp. 935 seq.

<sup>2</sup> *Viveash v. Becker* (1814), 3 M. & S. 284.

<sup>3</sup> *The Anne* (1818), 3 Wheat. 435.

<sup>4</sup> See E. C. Stowell, *Consular Cases and Opinions* (Washington, 1909).

<sup>5</sup> (1808), 1 Taunt. 106, 107.

<sup>6</sup> 7 Anne, c. 12.

<sup>7</sup> (1814), 3 M. & S. at p. 297.



conduct, and if that be violated the sovereign has a right to complain of such violation. Then it is expressly laid down that he is not a public minister, and more than that, that he is not entitled to the *jus gentium*. And I cannot help thinking that the Act of Parliament which mentions only 'ambassadors and public ministers,' and which was passed at a time when it was an object studiously to comprehend all kinds of public ministers entitled to these privileges, must be considered as declaratory, not only of what the law of nations is, but of the extent to which that law is to be carried." It appears to me that a different construction would lead to enormous inconveniences, for there is a power of creating vice-consuls; and they too must have similar privileges.'

The general force of these arguments is great; the practice is common of choosing consuls from among the natives of the particular country in which their services are required, and it would be intolerable that men so appointed should be protected from the jurisdiction of their own tribunals. But though he may not be 'entitled to the *jus gentium*,' e.g. the right of inviolability<sup>1</sup> and exemption from the local civil and criminal jurisdiction<sup>2</sup> which attach only to diplomatic persons, certain privileges are in practice conceded to a consul. He is allowed to place the arms of the country for which he acts over his house; he is immune from personal taxation, and from liability to jury service; soldiers may not be billeted upon him, and his house is inviolable in time of war. We are not here concerned with the modes in which consuls are appointed, but it must be noticed that they cannot enter upon their duties until authorised to do so by an exequatur issuing from the country in which their duties lie. An exequatur is a more or less formal authorisation to do, within the jurisdiction of the country granting it, the different acts incidental to consular authority.

Termination  
of consular  
authority.

The authority of a consul is terminated by an express revocation of the exequatur, and probably also by implication when his district is annexed to the territory of another state.<sup>3</sup> A breach of duty on his part may bring about the withdrawal of the exequatur. The case of Mr. Bunch, in 1861, is an interesting illustration. The latter, British consul at Charleston, was instructed by his Government to ask the Confederate authorities

<sup>1</sup> Personal inviolability is sometimes secured by means of special conventions between the states concerned.

<sup>2</sup> Cf. *R. v. Ahlers* [1915], 1 K.B. 616.

<sup>3</sup> The latter point is not definitely settled; cf. Oppenheim, *Int. Law*, vol. i, § 437, who holds that the authority *ipso facto* ceases in such a case.

whether they would observe the last three articles of the Declaration of Paris. Whereupon the United States requested his recall, on the ground that her law forbade any person, not specially appointed, to counsel, advise, etc., in any political correspondence with a foreign Government relating to disputes with the United States, and that the consul ought to have known of this law and to have notified his Government thereof before obeying its instructions. It was also contended that the appropriate agents to make known the wishes of a foreign Government were its diplomatic and not its consular officers. Accordingly, Mr. Bunch's exequatur was revoked.<sup>1</sup>

The duties of consuls are of a very various character, and can only be generally indicated. In the first place, as commercial agents, they are bound to succour tradesmen and sailors of the country by which they are employed; more generally, its citizens are entitled to look to their consul for advice and countenance in any of the innumerable difficulties which spring up among foreign surroundings. Consultative duties are among the most useful of those which fall upon consuls, and much invaluable knowledge is derived from the commercial reports which they are in the habit of submitting periodically to their Governments. Still more important are certain administrative and judicial functions which they are permitted to discharge. These may be arranged under three heads in an ascending order of importance.

(i) The verification of births, marriages and deaths, and the administration of intestate estates abroad among citizens of the country for which they act.

(ii) The exercise, within the limits locally conceded to them, of a disciplinary jurisdiction over merchant sailors of the employing state, and the decision, as arbitrators appointed by consent, of commercial disputes among its citizens.

(iii) In most non-Christian and partially civilised states the consuls of civilised powers exercise by consent a very responsible jurisdiction. They are the judges, generally speaking, in all matters civil and criminal which concern their countrymen. The chief countries in which immunity from the local jurisdiction still survives are Turkey, Siam, and China.<sup>2</sup> In these countries the practice is to try offences

<sup>1</sup> Mr. Adams to Earl Russell, Nov. 21, 1861: *U.S. Diplomatic Correspondence*, 1862, p. 1.

<sup>2</sup> In 1899 the extraterritorial consular jurisdiction was abolished in Japan. Turkey has for some time also been anxious to abrogate the system of capitulations; and shortly after the outbreak of the Great War, the Porte notified the powers that it did so on Oct. 1, 1914. Protests were made by the powers

committed by natives against foreigners in the local court, those committed by foreigners against natives in the consular court of the defendants, and in the court of the defendant's consul where the parties are foreigners of different nationality. The exemption from jurisdiction must be regarded as conventional where the country in which it is asserted is a member of the family of nations; as an extension of the national jurisdiction, comparable to that claimed on the high seas and in savage countries, when it is not. The mixed tribunals in Egypt were established in 1870 in the place of courts of this class; and their retention is largely due to political reasons.

In England this consular jurisdiction now rests on the Foreign Jurisdiction Act, 1890.<sup>1</sup> Sections 1, 2, 3 of that Act are as follows:—

1. It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has, or may at any time hereafter have, within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory.
2. Where a foreign country is not subject to any Government from whom Her Majesty the Queen might obtain jurisdiction in the manner recited by this Act, Her Majesty shall, by virtue of this Act, have jurisdiction over Her Majesty's subjects for the time being resident in or resorting to that country, and that jurisdiction shall be jurisdiction of Her Majesty in a foreign country within the meaning of the other provisions of this Act.
3. Every act and thing done in pursuance of any jurisdiction of Her Majesty in a foreign country shall be as valid as if it had been done according to the local law then in force in that country.<sup>2</sup>

Similar provisions for the regulation of American consular courts are contained in Acts of Congress passed in 1848, 1860 and 1870.<sup>3</sup>

affected thereby, but so far as Great Britain, France and Russia were concerned, the discussions ceased on the outbreak of the war between them and the Ottoman Government, Nov. 5, 1914.

<sup>1</sup> 53 & 54 Vict. c. 37.

<sup>2</sup> For details as to organisation, etc., see Sir H. Jenkyns, *British Rule and Jurisdiction beyond the Seas* (Oxford, 1902).

<sup>3</sup> For American practice, see F. E. Hinckley, *American Consular Jurisdiction in the Orient* (1906).

It will be apparent that these judicial duties demand a high degree of knowledge and competence for their proper discharge; and it may be hoped that the tendency will grow for nations to engage at every important centre their own subjects in consular employment, excluding them at the same time from private trade. Under such conditions it would probably be found practicable to extend the immunities of consuls to the point rather prematurely assumed by Heffter,<sup>1</sup> when he affirms that they enjoy 'that inviolability of person which renders it possible for them to perform their consular duties without personal hindrance.'

<sup>1</sup> A. W. Heffter, *Le Droit international de l'Europe*, 4me éd. par F. H. Geffcken (Berlin and Paris, 1883), § 244.





## PART II

### THE RIGHTS AND OBLIGATIONS OF STATES IN TIME OF PEACE

WHEN we speak of a state as enjoying a right to do a certain act, we mean that the public opinion of other states will view the doing of that act with approval, or at least with acquiescence. Correlatively, a state lies under an obligation to do or forbear from a certain act when its omission to do, or non-forbearance from doing, that act will be viewed with disapproval and perhaps by an attempt to compel. Such rights and obligations are, of course, distinguishable from those of municipal law, which are enforced, if necessary, by the strong arm of society. In this limited sense of the words a consideration of the rights and obligations of states in peace, war and neutrality forms a convenient method of exhibiting the whole subject of international law.

#### CHAPTER I

##### INDEPENDENCE—INTERVENTION

THE statement that states have a right to their independence is elementary and need not be elaborated. The principle has been often violated, but its immense practical influence can hardly be overstated. The sentiment of nationality, which in our own time called into being the kingdoms of Italy and Greece, which combined with political considerations to effect the unification of Germany, and which continues to be asserted at the present day as emphatically as ever, depends on the assumption that men of one race should enjoy an independent Government of their own.

It is less easy to state positively the constituent rights which, taken together, amount to independence. Mr. W. E. Hall has laid it down in general language <sup>1</sup> that 'independence is the power of giving effect to the decisions of a will which is free, in so far as absence of restraint by other persons is concerned. The right of independence, therefore, in its largest

Nature of  
independ-  
ence.

<sup>1</sup> *International Law*, 7th ed. p. 48.

extent, is a right possessed by a state to exercise its will without interference on the part of foreign states, in all matters and upon all occasions with reference to which it acts as an independent community.' The last limitation is made necessary by the fact that 'a state is capable of occupying the position of a private individual within foreign jurisdiction, as, for example, in the case of England, which holds shares in the Suez Canal Company.'<sup>1</sup> Mr. T. J. Lawrence<sup>2</sup> defines independence as 'the right of a state to manage all its affairs, whether external or internal, without control from other states.' Both these definitions or descriptions are of a general character, and may require to be strictly modified in practice, but the essential conception is familiar, and therefore readily grasped. An independent state is entitled to live its own life in its own way, the sole judge within the law of its domestic government and its foreign policy. The particular form of government which it has chosen in the working out of its national destiny concerns itself and itself alone, for every independent state has the right of setting its own house in order. In asking how far these incidents are found at present in states claiming to be independent, it must be remembered that here, as elsewhere, authoritative international practice must be regarded, and not the repetitions of text-books. A consideration of the history of Europe and the American continents in the present century will make it clear that the rights to independence can only be claimed for many nominally independent communities with substantial qualifications.

Phillimore summarises the rights incident to independence as follows:<sup>3</sup>

1. The right to a free choice, settlement, and alteration of the internal constitution and government without the intermeddling of any foreign state.
2. The right to territorial inviolability, and the free use and enjoyment of property.
3. The rights of self-preservation, and this by the defence which prevents, as well as by that which repels, attack.
4. The right to a free development of national resources by commerce.
5. The right of acquisition, whether original or derivative, both of territorial possessions and of rights.

<sup>1</sup> *International Law*, p. 48, footnote.

<sup>2</sup> *Int. Law*, 4th ed. p. 119.

<sup>3</sup> *Int. Law*, vol. i, p. 162.

6. The right to absolute and uncontrolled jurisdiction over all persons and things within, and in certain exceptional cases without, the limits of the territory.

The same writer derives from 'membership of a universal community' of nations four other rights which may, at least as conveniently, be also referred to the principle of independence:

7. The right of a state to afford protection to her lawful subjects wheresoever situate.
8. The right to the recognition by foreign states of the national Government.
9. The right to external marks of honour and respect.
10. The right of entering into international covenants or treaties with foreign states.<sup>1</sup>

The points indicated in this summary afford a fair account of the rights involved in independence. It is in fact an abstract right limited firstly by the maxim, *Sic utere tuo ut alienum non lædas*; secondly, by the existence of similar rights in other nations; and thirdly, by the possibility that it may come into conflict with a competing principle to which it is bound to give way. The right to territorial inviolability involves the right of a state to prevent any other state from exercising any jurisdiction within its territory.

A breach of this right was recently alleged in the case of *The Savarkar*,<sup>2</sup> an Indian, who was being conveyed under arrest in a British ship to India to take his trial for abetment of murder. The prisoner escaped while the vessel was at Marseilles and was re-arrested on French territory, and the case came before the Hague Arbitration Court, who, by their judgment, delivered on the 24th of February, 1911, found that the French police had been warned of his being brought to Marseilles; that he was arrested by a French officer and taken back to the vessel by that officer and three persons who had come on shore from the vessel; that no force or fraud had been employed by anybody from the vessel to obtain possession of him; and that, though an irregularity had been committed in delivering up a prisoner without extradition proceedings, there was in the circumstances no violation of French sovereignty, and nothing establishing any obligation on the part of Great Britain to

<sup>1</sup> *International Law*, vol. i, p. 163.

<sup>2</sup> See *The Times*, Feb. 25, 1911; *Amer. Journ. of Int. Law*, vol. v (1911), pp. 520-523; G. G. Wilson, *The Hague Arbitration Cases* (Boston and London, 1915), pp. 230 *seq.*



deliver up the prisoner. The decision, by its negative findings, illustrates the positive rule that, apart from waiver of the right, no nation may exercise criminal jurisdiction or arrest or confine any person in the territory of another nation.<sup>1</sup>

Interven-  
tion.

The right to violate the independence of a nation is known as the right of intervention, and a consideration of the occasions when intervention is permissible will most usefully illustrate the inroads which practice has made upon independence.

'Neither,' says Lord Bacon,<sup>2</sup> 'is the opinion of some of the schoolmen to be received that a war cannot justly be made but upon a precedent injury or provocation; for there is no question but a just fear of an imminent danger, though there be no blow given, is a lawful cause of a war.' 'No Government,' said Chateaubriand in the French Chamber (1823) on the occasion of the Spanish war, 'has a right to interfere in the affairs of another Government, except in the case where the security and immediate interests of the first Government are compromised.'<sup>3</sup> This is the principle upon which intervention must ultimately depend. Where 'there is a just fear of an imminent danger,' or, rather more strongly, where the vital interests of a state are gravely menaced, the paramount principle of self-preservation comes into play. If a neighbouring country swells its armaments to a degree not to be reconciled with the simple aim of self-defence, if the preparations from the nature of the case can only be directed against one object, the community menaced may strike at its own time, without awaiting further provocation. International law is at its weakest, and its writers are least convincing, on the subject of intervention: the main reason for this being perhaps because the question appertains more to the sphere of politics than to that of the law of nations,—for in several topics of international law, jurisprudence and politics are very closely related. The maxim, *Nemo potest judex esse in re sua*, has no place in the law of nations, and the interested nation itself decides on the extent of provocation, and the imminence of peril. Under these circumstances it is not surprising that the line between policy and law is slightly drawn, so that high-handed acts of aggression have been able to masquerade under the name of intervention. The danger of a rule is apparent

<sup>1</sup> The decision has provoked a good deal of controversy, and has been condemned by several writers; see Oppenheim, vol. i, p. 411, note 1, where various references are given.

<sup>2</sup> *Essay on Empire*.

<sup>3</sup> *Moniteur*, Feb. 15, 1823; Alison, *History of Europe*, chap. xii, § 41.

which would permit one nation to interfere in the concerns of another in order to prevent the wrongful intervention of a third, being itself the only judge of the likelihood of such intervention and of its moral or legal justifications. It seems possible to base upon the modern practice of nations a simple and more exclusive statement of the occasions on which intervention is permissible. It may be defended on two occasions only:—

1. When it is made necessary by self-preservation.
2. When it is undertaken by the general body of powers.

(1) Westlake,<sup>1</sup> taking as his text a passage from Rivier,<sup>2</sup> Self-preservation. argues at some length against the suggestion that the right of self-preservation overrides in all cases the duty to respect the rights of others, and entitles a state to do violence to another state whose conduct has been innocent of all wrong. He points out that even an individual is not in English law allowed 'to ward off danger from himself by transferring it to an innocent person'; and that even if an individual had such a right, it would not follow that the same thing could be said of a state. 'Patriotism should not allow us to forget that even our own good, and still less that of the world, does not always and imperatively require the maintenance of our State, still less its maintenance in its actual limits and with undiminished resources.'<sup>3</sup>

It can hardly be said, however, that a state would never be justified in violating the sovereignty of another state, unless that other had actually done, or threatened to do, it harm. Westlake himself approves of the action of Great Britain who, in 1807, when there was an imminent danger of Napoleon and the Czar compelling the Danish fleet to join them against her, called upon Denmark, a friendly nation, to surrender her fleet till the war was over, and on her refusing, captured that fleet by force. It is true that Westlake justifies his approval of the course taken by an attempt to bring the case within the rule that a state may defend itself against another which threatens to attack it. 'The principle,' he says, 'that the legal rights of a state are not to be violated without its own fault, is not really infringed, for when a state is unable of itself to prevent a hostile use being made of its territory or its resources, it ought to allow proper measures of self-protection to be taken

<sup>1</sup> Part I, pp. 309 *seq.*

<sup>2</sup> *Principes du Droit des Gens* (Paris, 1896), t. i, pp. 277-8.

<sup>3</sup> Westlake, Part I, p. 312.

by the state against which the hostile use is impending, or else must be deemed to intend that use as the necessary consequence of refusing the permission. It is a principle of jurisprudence that every one is presumed to intend the necessary consequences of his actions.' But that is equivalent to saying that Denmark was morally to blame for not being a power strong enough to resist France and Russia; for how otherwise was she under any moral obligation to hand over her fleet to Great Britain, and how on her refusal to do so did she become a state in fault against whom Great Britain was entitled to take so extreme a step? It is surely better to admit that there may be circumstances in which, in self-defence, a state is entitled to violate the sovereignty of another, even though that other is in no way in fault; and to insist only that such violation shall be accompanied by the minimum of injury, and be justified by the most urgent necessity. The simple fact was, that in view of the forces against her, Great Britain had every reason to fear invasion and possible conquest if the Danish fleet were brought into operation; and the real defence of her action is, that she only intended to sequester the Danish fleet, and pledged herself to restore it when the danger was over. The question is one of the degree of injury done rather than of the moral delinquency, actual or constructive, of the injured state. The Danish incident was an extreme case; it would hardly be argued that any imaginable danger would have justified Great Britain in conquering and annexing Denmark, or even in capturing her fleet, without a previous offer of restitution or compensation.<sup>1</sup>

But the rule so laid down and so safeguarded (we call it a rule, though it is in fact an exception to the rule of the inviolability of state sovereignty) will satisfactorily cover all those cases where a state 'intervenes' by violation of the sovereignty of another state, which is not, except by a rather strained application of a legal presumption, guilty of any actual or threatened attack. Such cases usually involve little more than a sentimental injury to the state which suffers from the intervention. One of the best known occurred towards the end of the year 1837. During the Canadian insurrection, the American steamer, the *Caroline*, which was used by the

<sup>1</sup> The British action has been disapproved of by continental writers generally, but defended by Anglo-American publicists. One of the most eminent naval writers of modern times, who by reason of his American nationality would not be prejudiced in regard to the proceeding, has justified it: A. T. Mahan, *Influence of Sea Power upon the French Revolution* (Boston, 1892), vol. ii, p. 277.



insurgents and their American adherents for purposes of military transport and invasion, was seized by Canadian forces and set adrift over the Niagara Falls, with the loss of only two lives. This act within American territory was followed by a controversy between the two Governments, which lasted some five years. Great Britain claimed justification on the ground of self-defence; but the main difficulty was to determine when the necessity of self-defence could be said to be valid and operative. In the course of the negotiations, however, Daniel Webster, Secretary of State, formulated a rule,<sup>1</sup> whose applicability was accepted by Lord Ashburton: viz. that in order to justify the act of the Canadian authorities England must show a 'necessity of self-defence, instant, overwhelming, and leaving no choice of means and no moment for deliberation,' and also that the said authorities 'did nothing unreasonable or excessive, since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it.' These conditions were proved to have been fulfilled, and the matter was settled amicably.<sup>2</sup> It may be added that the rule enunciated by Webster would, however, be more acceptable if the words 'and no moment for deliberation' were omitted, because they import an excessively stringent condition in the circumstances. Somewhat similar had been the action of the United States in 1817, when the Spanish Amelia Island was seized by Spanish insurgents. Spain was unable to prevent them from becoming a danger to the United States, and the latter thereupon occupied the island. Under the same heading may be classed those cases where a state violates the flag of a friendly nation at sea, when that flag is being used by individuals to cover a hostile enterprise. Spain, in 1873, seized the *Virginus*, a vessel fraudulently registered in the United States, but belonging to and used by Cuban insurgents; and whatever may be said of the summary execution of those on board, there was nothing to complain of in the arrest.<sup>3</sup>

While, therefore, it must probably be admitted that the invasion of the sovereignty of a non-offending and friendly state is in extreme circumstances permissible, it will be generally agreed that intervention should so far as possible be exercised only against a state which itself threatens danger to the intervening state. Hence the invasion of Belgium and

Cases of intervention.

<sup>1</sup> Mr. Webster to Mr. Fox, April 24, 1841.

<sup>2</sup> See *Parl. Papers* (1843), vol. lxi, pp. 46-51; J. B. Moore, *International Arbitrations*, etc. (Washington, 1898), vol. iii, pp. 2419 seq.

<sup>3</sup> *Parl. Papers* (1874), vol. lxxvi; Cobbett, *Cases*, vol. i (1909), pp. 165 seq.; Moore, *Digest*, vol. ii, pp. 895 seq.



Luxemburg by the German forces in August, 1914, was unjustifiable (apart from the special protection accorded to the country by neutralisation); the plea of military necessity and self-preservation is not tenable, when the act had long been planned beforehand and formed part of a programme.<sup>1</sup> Self-preservation should mean self-defence. Every claim to intervene on these grounds must be judged on its own particular facts. Great Britain in 1804 was justified in attacking Spain on discovering that that country was about to join France and was preparing for war. Austria in 1813 was justified in joining Russia and Prussia against Napoleon, when the movement of his troops showed an intention to intimidate her by force.

To deal uncontroversially with highly controverted facts, the truth is elementary that Great Britain would have been legally justified in intervening to prevent the further armament of the Dutch Republics, assuming that such armaments clearly exceeded the limits of proper self-defence.<sup>2</sup> Whether the possibilities opened up by the Jameson Raid, and the revolutionary schemes imputed to Johannesburg, raised the requirements of legitimate self-defence high enough to justify the extraordinary elaborateness of the Boer armaments, is a question which different persons will no doubt answer differently. The principle at least is clear.

A further illustration may be drawn from the war in which this country became involved in consequence of the French Revolution. *Prima facie*, France in 1792 was as much entitled to enjoy an uninterrupted revolution as England in 1688. The legality of the intervention must stand or fall with the seriousness or otherwise of the apprehension that an aggressive propagandism of revolutionary principles was contemplated by the French Convention. No doubt the danger was exaggerated, but the *rédaction* of November 19, 1792, is still on record:—‘La Convention nationale declare qu’elle accordera secours à tous les peuples qui voudront recouvrir leur liberté, et elle charge le pouvoir exécutif de donner des ordres aux généraux des armées françaises pour secourir les citoyens qui auraient été ou qui seraient vexés pour la cause de la liberté.’ It is easy to say now that the menace was never more than verbal, but

<sup>1</sup> See Phillipson, *Int. Law and the Great War*, chap. ii. Cf. *Protest by the Belgian Government against the German Allegation that Belgium had forfeited her Neutrality before the outbreak of War* (published under the authority of the British Government).

<sup>2</sup> Cf. Bismarck’s intimation to Lord Loftus, July 13, 1870: ‘I am positively informed that France has been and is now arming. If this go on, we shall be compelled to ask the French Government for explanations.’—Busch, *Our Chancellor*, vol. ii, p. 55.

it must have appeared terrible enough to those who viewed with deepening apprehension the conceptions of *la liberté* which were growing in French favour.

The doctrine under consideration was pushed to entirely inadmissible lengths by the Holy Alliance, the pretensions of which are of great historical interest, because out of them sprang by revulsion the Monroe Doctrine. The parties to this understanding were the rulers of Russia, Austria, Prussia and France. Setting aside the idealist tinge contributed by the dreamy mind of the Emperor Alexander, the objects of the Alliance as developed at the Congresses of Aix-la-Chapelle, Troppau and Laybach were clear enough. A circular issuing from Austria, Russia and Prussia alleged the existence of 'a vast conspiracy against all established power, and against all the rights consecrated by that social order under which Europe had enjoyed so many centuries of glory and happiness.' . . . 'They regarded as disavowed by the principles which constitute the public right of Europe all pretended reform operated by revolt and open hostility.' Lord Castlereagh's circular dispatch in reply<sup>1</sup> has been often referred to: Such principles, he said, 'were adapted to give the great powers of the European continent a perpetual pretext for interfering in the internal concerns of its different states . . . though no government could be more prepared than the British Government was to uphold the right of any state or states to interfere, where their own immediate security or essential interests are seriously endangered by the internal transactions of another state, it regarded the assumption of such a right as only to be justified by the strongest necessity, and to be limited and regulated thereby. . . . The British Government regarded its exercise as an exception to general principles of the greatest value and importance, and as one that only properly grows out of the special circumstances of the case; but it at the same time considered that exceptions of this description never can, without the utmost danger, be so far reduced to rule as to be incorporated into . . . the institutes of the law of nations.'

In 1823 the powers to whom the dispatch was addressed had under consideration the propriety of helping Spain to subdue her rebellious South American colonies. Proposals were actually made to hold a congress to consider South American affairs. Canning, then Minister of Foreign Affairs, suggested to the American minister in London that any attempt

<sup>1</sup> January 19, 1821: *Annual Register*, vol. lxii, p. 737.

by Europe to decide the fate of states so nearly connected with the United States by community of geographical and political interest as the South American Republics, ought to be most jealously watched. Out of this suggestion arose the celebrated Monroe Doctrine, which was embodied in the annual message to Congress of President Monroe on December 2, 1823. It contained two distinct statements:—

1. 'It is a principle in which the rights and interests of the United States are involved that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for colonisation by any European powers.'

2. 'With the existing colonies and dependencies of any European Power we have not interfered and we shall not interfere; but with the Governments who have declared their independence and maintained it, and whose independence we have on great consideration and on just principle acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny by any European power in any other light than as the manifestation of an unfriendly disposition towards the United States.'<sup>1</sup>

This policy had already been expressed more tersely and more comprehensively by Jefferson in a letter written to Monroe, October 24, 1823: 'Our first maxim should be, never to entangle ourselves in the broils of Europe; our second, never to suffer Europe to intermeddle in cis-Atlantic affairs.' The doctrine was extended in 1870 by President Grant, who declared that in future 'no territory on this continent shall be regarded as a subject of transfer to a European power.' With some of the extravagant utterances of President Grant in favour of a cessation of relationships between Europe and America—a consummation impossible of achievement—we are not here concerned; we need only notice the attempts which have been made to treat the doctrine as a part of international law, and inquire how far they can be supported. Putting on one side the self-denying ordinance which precludes America from interference with European questions, two principles are contended for, which may be respectively termed:—

1. The non-colonisation principle;
2. The non-intervention principle.

It is material to notice that the assertion of each was elicited

<sup>1</sup> On the Monroe Doctrine, see Moore, *Digest*, vol. vi, chap. 20; J. B. Henderson, *American Diplomatic Questions* (New York, 1901).



by particular circumstances: the first by a Russian attempt to acquire the North-West Territory, the second by the designs of the Holy Alliance. In 1895, however, in his message to Congress of December 17, President Cleveland observed of the doctrine: 'It may not have been admitted in so many words to the Code of International Law; but since in International Councils a nation is entitled to the rights belonging to it, if the enforcement of the Monroe Doctrine is something we may justly claim, it has its place in the Code of International Law as certainly and surely as if it were specifically mentioned.' A more completely circular argument was never devised; and one of the leading American writers in international law<sup>1</sup> has taken the other view strongly: 'The declarations are only the opinion of the Administration of 1823, and have acquired no legal form or sanction.' On the other hand, they have often been insisted upon by American statesmen, and have become more and more a settled principle of American policy.<sup>2</sup> In 1824, when a general negotiation was in progress between this country and the United States, the assertion by the latter of the non-colonisation principle was met by a refusal on the part of Canning, who represented this country, to proceed any further in the Anglo-American controversy with Russia. The English view was unequivocally placed on record that Great Britain considered the whole of the unoccupied parts of America as being open to her future settlements in like manner as heretofore.

It is, however, on its intervention side that the doctrine has attracted most attention. The American contention in the Venezuela negotiations in 1895 far exceeded the scope hitherto claimed by the most extensive commentators on President Monroe's message. A long-standing dispute between Great Britain and Venezuela as to the proper boundary between the Republic and British Guiana became acute in 1895. The British claims were finally affirmed in the form of an ultimatum. Venezuela, it need hardly be said, is a sovereign independent state. Under these circumstances appeared the message of President Cleveland. Its material portions were as follow: 'The balance of power is justly a cause of jealous anxiety among Governments of the Old World, and a subject for our absolute non-interference. None the less is the observ-

Venezuelan  
boundary  
dispute.

<sup>1</sup> R. H. Dana, note to Wheaton, *Int. Law*, 8th American edition (Boston, 1866), § 67, note 36.

<sup>2</sup> Strangely enough, the doctrine has never been directly affirmed by either the Senate or the House of Representatives.



ance of the Monroe Doctrine a vital concern for our people and their Government. . . . If an European power, by an extension of its boundaries, takes possession of the territory of one of our neighbouring republics against its will and in derogation of its rights, it is difficult to see why, to that extent, such European power does not thereby attempt to extend its system of government to that portion of this continent which is thus taken. . . . The dispute has reached such a stage as to make it now incumbent upon the United States to determine, with sufficient certainty for its justification, what is the true divisional line between the Republic of Venezuela and British Guiana. . . . I suggest that Congress make an adequate appropriation for the expenses of a commission, to be appointed by the Executive, which shall make the necessary investigation and report upon the matter with the least possible delay. When such report is made and accepted, it will, in my opinion, be the duty of the United States to resist, by every means in its power, as a wilful aggression upon its rights and interests, the appropriation by Great Britain of any lands, or the exercise of governmental jurisdiction over any territory which, after investigation, we have determined of right to belong to Venezuela.'

The actual dispute was settled by arbitration in 1899, for the greater part in favour of the British claim; but Venezuela was represented throughout the arbitration by the United States. The broad question of the right of the United States to dictate to European nations in their relations with South American States remained unsettled. If the claims then made are sanctioned by acquiescence so as to become a portion of international law, the doctrine of equality may be finally banished from our text-books, to be replaced by a legal hegemony on the part of the United States over the whole of the American continents. It is involved in the American claim that no European nation can exact redress from a South American Republic in the only manner in which a demand for redress is likely to be at all effective. Powerful European nations are not likely to acquiesce in a view which in effect concedes national character to these states while exonerating them from its correlative responsibilities. Nor is it to be supposed that the sane judgment of thoughtful Americans will insist on a view so extreme; it is, however, not impossible that political exigencies may in time compel the United States to declare a protectorate over the South American Republics. Such a step, whatever its political aspects, would at least clear

the legal atmosphere, and would effectually meet the legitimate American aversion to a violent European irruption into the New World. Until such a change takes place, the lawyer may dismiss the doctrine with the comment that in its most moderate form it involves an enormous addition to the commonly received conception of the rights of self-preservation.

It may be added that in 1901, when Great Britain, Germany and Italy sought to make Venezuela carry out her international obligations, the United States held aloof from the controversy. Referring thereto in his message to Congress, December 3, President Roosevelt observed: 'We do not guarantee any state against punishment if it misconducts itself, provided that punishment does not take the form of the acquisition of territory by any non-American power.'<sup>1</sup> Early in the Great War it was reported that Ecuador and Colombia disregarded their neutrality by permitting Germany to use their wireless stations; whereupon Great Britain and France asked the United States to bring pressure to bear on the republics in order to secure the due fulfilment of their duties of neutrality, otherwise the Allies would have to take action themselves. This representation to the United States was thought to involve a recognition of the primacy of the United States on the American continent, and a generous acceptance of the Monroe doctrine.<sup>2</sup>

Primacy of  
U.S. in  
America.

(2) It was stated that intervention was permissible, in the second place, when undertaken by the general body of civilised states in the interests of general order. This ground of intervention is often ignored by writers who acknowledge much more disputable justifications. No writer who derives his views of law from the practice of states, and not from theoretic reasoning, can refuse to admit it. It has been repeatedly asserted, and its exercise has not been questioned during the past century. The international birth of Greece in 1832 was the result of a European intervention in the affairs of Turkey; the petulant childhood of the kingdom thus called into existence was systematically regulated by the Concert of Europe, and under the same tutelage Greece has received periodic accessions of territory at the expense of Turkey. By a similar exercise of jurisdiction the independence of Belgium was extorted by the great powers in 1839 from the King of Holland;

The concert  
of powers.

<sup>1</sup> Moore, *Digest*, vol. vi, p. 590.

<sup>2</sup> *The Times*, Nov. 14, 1914, p. 8.

and in 1878 a conditional independence was bestowed upon Montenegro, Rumania and Serbia. On each of these occasions the act was clearly one of intervention; the jurisdiction is thus established in practice, and is not objectionable in theory. Unanimity of the great powers is the best guarantee against individual self-seeking.<sup>1</sup>

Intervention  
on grounds  
of humanity.

It is believed that the two grounds of intervention which have been considered are alone consistent with modern practice. It is sometimes suggested that on humanitarian grounds one nation is justified in intervening to prevent practices shocking to humanity within the territory of another. The occasional benefits of such intervention would be outweighed by its liability to abuse. In theory no doubt it is regrettable that international law should prohibit, even by implication, the suppression of outrage, but in practice the number of national Don Quixotes is not found to be considerable, and thinkers of very different schools are content to distinguish between the moral standards applicable respectively to individuals and

<sup>1</sup> Developments in the Far East make it impossible to limit the activity of the concert of powers to European complications; and the recent instances of intervention in Chinese and Japanese affairs have been on the whole warnings against a too reckless indulgence of the habit. There was little but personal self-interest to be traced in the intervention of Russia, Germany and France, which prevented Japan from taking full advantage of the Treaty of Shimonoseki, 1895, and in the various operations of 'leasing' Chinese territory which followed. These were illustrations rather of the rivalry between, than the concert of, powers; but the Boxer rising in 1900 was the opportunity for an admirable statement of the conditions on which concerted intervention depends, made by M. Delcassé in the French Chamber on June 11, 1900. The French minister observed:—

'For the second time recently the legations have been obliged to demand troops of the naval commanders. The common peril dictates resolutions to the powers. I do not know if they have divergent views, but the affirmation of their solidarity is the surest guarantee for the safety of each. The powerlessness of the Chinese Government to suppress an insurrection which does not appear to inspire it with either fear or surprise is becoming irremediable, so that new and serious misfortunes must be expected. I have instructed our minister, at whose disposal I have placed all our forces in the Far East, and others if required, to keep himself in constant communication with his colleagues of the diplomatic corps whose accord has not ceased to be complete. At the present moment, while I am speaking, a step is being taken, or is about to be taken, by the various legations to call the attention of the Chinese Government for the last time to the imperious necessity of putting down a movement which imperils both the empire and itself, as well as the interests which the powers cannot disregard. If this appeal were to remain without effect, the powers would no longer have to take counsel with any one but themselves, and to take into account nothing but the interests of civilisation; and I imagine that if a misunderstanding were destined to arise between them, it would be as to which would be ready the first, which would assemble most rapidly the most effectual means to defend with its own cause the cause of civilisation itself' (Letter, date June 11, from the *Standard* correspondent in Paris). Cf. Moore, *Digest*, vol. v, pp. 514 seq.



communities.<sup>1</sup> Sir William Harcourt<sup>2</sup> has described humanitarian intervention as a high act of national policy over and beyond law. This view is indecisive unless such acts are to be withdrawn from the purview of international law altogether, for their legal or illegal quality requires determination all the more imperatively that they have a 'high political' character.

It is often stated that intervention depending upon a treaty right is permitted, but the claim is perhaps somewhat academic. If the arrangement is merely dynastic it cannot be supported, for the sovereign who has exposed his country to an intervention intended to secure his dynasty, has clearly exceeded the limits of his competence as a national agent; if, on the other hand, one country has entitled another to intervene indefinitely in its domestic concerns, the derogation from independence would probably not consist with the retention of international character. But intervention conformably to the rights and obligations established by collective treaties of guarantee,<sup>3</sup> and also for the purpose of safeguarding or vindicating general international law, is clearly defensible; indeed it becomes in such circumstances an indefeasible duty. Hence the entry of Great Britain in the Great War,<sup>4</sup> as well as of the United States, was legally justifiable.

Intervention  
on ground of  
treaty or  
law.

Intervention in a foreign civil war has been sometimes declared legal, but the case hardly requires separate consideration. If undertaken at the invitation of both parties, it is mediation by request and therefore unobjectionable; if at the invitation of one, then it is either an unjustifiable interference with an established Government or an equally unjustifiable attempt to dictate to a nation the form of government under which it shall be ruled, for Hall's observation is unanswerable: ' . . . The fact that it has been necessary to call in foreign help is enough to show that the issue of the conflict would without it be uncertain, and consequently that there is a doubt as to which side would ultimately establish itself as the legal representative of the state.'<sup>5</sup>

Intervention  
in civil war.

<sup>1</sup> Bismarck's cynical remark, that he placed the bones of a Pomeranian grenadier above all Armenia, has been often reprobated and is offensive in expression, but the general principle of which it was only a particular application is commonly acted upon by statesmen of every country, and even Mr. Bright strongly denounced the views of those who would make England the Knight-Errant of Nations.

<sup>2</sup> *Letters of Historicus* (London, 1863), p. 41.

<sup>3</sup> See *infra*, p. 145.

<sup>4</sup> Cf. Phillipson, *Int. Law and the Great War* (1915), chap. i.

<sup>5</sup> 7th ed. p. 302.



Balance of  
power.

The theory of the balance of power<sup>1</sup> has in the past frequently supplied an excuse, but seldom, if ever, a justification for intervention. At the beginning of the eighteenth century the prospect of a union between France and Spain was the cause of much fighting, and Napoleon III. relied upon the theory in his attempts, partly successful and partly unsuccessful, to increase the territory of France; but little has been heard of it in late years. The idea of preserving an 'international equilibrium of forces' must always exercise a certain influence upon diplomacy, but the world, except in certain phases of popular discussion, has apparently abandoned the notion that a state may justly be attacked and punished for becoming too strong. It may be added that during the Great War a strong and growing movement was in many parts of the world set on foot for the purpose of substituting a 'league of nations' for the principles of a European concert and balance of power; by this means intervention in an appropriate case could be exercised legally and more effectively.

<sup>1</sup> This question is closely connected with that of the Concert of Europe, already referred to. For a full discussion of the whole subject, see C. Dupuis, *Le Principe d'équilibre et le Concert européen* (Paris, 1909).

## CHAPTER II

### PROPRIETARY AND QUASI-PROPRIETARY RIGHTS AND DUTIES

THE rights and duties of nations considered as proprietors may be arranged under four heads:—

1. Rights over land.
2. Rights over water.
3. Rights over the air-space.
4. Rights over miscellaneous objects.

#### I. RIGHTS OVER LAND

A state may exercise control over land in a variety of degrees, directly as over an integral part of its dominions, or indirectly as over a protectorate or sphere of influence. In the two cases last mentioned it is a question of fact in each case whether the rights claimed are proprietary at all in their character. A state may acquire territory in a variety of ways, of which four are sufficiently important to be mentioned here. These are occupation, cession, conquest, and prescription.

Occupation is a good root of title to territories altogether unoccupied or inhabited by savages, who, by a humorous fiction, are considered incapable of possessing territory<sup>1</sup> on the ground that they are not duly organised into a political community possessing the attributes of sovereignty and independence in accordance with the requirements of the law of nations. Occupation is distinguished from cession and conquest in that in the case of occupation the territory acquired is not subject to the sovereign of another state, in cession the acquiring state receives territory from the ceding state as former owner by means usually of an amicable transaction, in conquest the acquiring state appropriates forcibly as a result of success in war territory belonging to the defeated

<sup>1</sup> It is better to state this proposition boldly than, like Phillimore (vol. i, chap. xii, § cxxlii, p. 286) to accept the argument, 'The North American Indians would have been entitled to have excluded the British fur-traders from their hunting-grounds; and not having done so, the latter must be considered as having been admitted to a joint occupation of the territory, and thus to have become invested with a similar right of excluding strangers from such portions of the country as their own industrial operations pervade.'

country. The rules of occupation were borrowed wholesale from the very sensible provisions of Roman private law. Discovery of new territory—*territorium nullius*—by a private individual was generally held to confer a good title on the state to which he belonged. For a time the rule was not practically inconvenient, but the discovery of the New World subjected the doctrine to a strain which it was wholly unable to support. The rule which originally determined the right to a derelict article—*res nullius*—in the streets of Rome was applied to the vast territories which each year's maritime adventure was disclosing to the nations of the world. Spain and Portugal, relying partly on papal bulls and partly on discovery, claimed the right to divide between themselves the hitherto undiscovered areas of the world. Henry VII. of England laid claim to a share, respecting in theory the rights of prior discoverers.

These pretensions produced a reaction until in our days 'prior discovery, though still held in considerable respect, is not universally held to give an exclusive title.'<sup>1</sup> Unless followed up by settlement, discovery 'is only so far useful that it gives additional value to acts in themselves doubtful or inadequate.'<sup>2</sup> Private individuals, bearing no commission from their Government, are not capable of legal occupation;<sup>3</sup> but acts of control done and continuing to be done by such persons, if ratified by their Governments, may be retrospectively validated. Further, the state act of occupation or of ratification must be of a public nature, so that due warning may be given to other states.<sup>4</sup> The underlying principle is that occupation to be valid must be reasonably effective, having regard to the circumstances of the particular case. Formal annexation, without more, is not therefore a root of title, though the fact of such previous occupation may lend a different colour to later acts which, if they stood alone, would be indifferent or indecisive. These conclusions have been stated with sound

<sup>1</sup> Sir H. S. Maine, *International Law* (London, 1888), p. 66.

<sup>2</sup> Hall, 7th ed. p. 104.

<sup>3</sup> The United States in the Oregon dispute based a claim on an unratified discovery and occupation by private individuals. This was not admitted by Great Britain, and the question was settled by the Treaty of Washington (1846), followed by an arbitration before the German Emperor, 1872. See Wheaton (ed. Phillipson), pp. 276-281; Moore, *Digest*, vol. i, §§ 80, 81, 104; vol. v, § 835; Sir T. Twiss, *The Oregon Question* (London, 1846).

<sup>4</sup> Cf. *The Fama* (1804), 5 C. Rob. 106, 115, 116; Westlake, Part I, p. 100. The Institute of International Law, in its Project relating to the occupation of territory (1888), agreed that public notification should be an essential condition of real occupation: see *Annuaire de l'Institut de Droit International*, vol. x, p. 201.

common-sense by Hall: <sup>1</sup> 'It can only be said, in a broad way, that when territory has been duly annexed, and the fact has either been published or has been recorded by monuments or inscriptions on the spot, a good title has always been held to have been acquired as against a state making settlements within such time as allowing for accidental circumstances, or moderate negligence, might elapse before a force or a colony were sent out to some part of the land intended to be occupied; but that in the course of a few years the presumption of permanent intention afforded by such acts has died away, if they stood alone, and that more continuous acts or actual settlement by another power became a stronger root of title.'

It is clearly important to define the area over which a geographically partial act of occupation may be allowed to extend. In the early days of American colonisation, extravagant pretensions were put forward by both England and France, and the view is alleged (though probably wrongly) to have been held in this country that occupation of the coast carried with it the whole continent to the Pacific Ocean.<sup>2</sup> A more reasonable rule is generally adopted, that occupation of a coast shall comprehend the interior as far as the watershed of the river flowing into the sea at the point of occupation; laterally such occupation embraces the tributaries of such rivers, and the territory covered by them.<sup>3</sup> Even these principles, however, may lead to extravagant results, particularly in the case of rivers like the Mississippi, and disputes on the subject have usually ended, like the Oregon dispute, in compromise. A claim to the 'hinterland' of a coast settlement may probably be admitted if the region claimed can only be reached by transit through the occupied coast; if that region is accessible from another direction then, in the words of Westlake, 'it can only be within moderate limits of space and for a moderate duration of time proportioned to the urgency of the need of protection for trade and settlement in the interior, that a sphere of interest radiating from the nearest coast will properly command international respect.'<sup>4</sup> It may be supposed that the area within which the doctrines above stated can be practically applied is rapidly lessening, although

Area of  
occupation.

<sup>1</sup> 7th ed. p. 105.

<sup>2</sup> There was no limit specified in the English colonial grants, and the early settlers seem to have met French aggression with indefinite claims to the interior.

<sup>3</sup> This principle was stated at the Louisiana negotiation in 1804. See Sir Travers Twiss, *Law of Nations, Time of Peace* (Oxford, 1884), §§ 125, 126; Phillimore, vol. i, § 238.

<sup>4</sup> Part I, p. 116.



in recent times the opening up of the African continent has brought them into prominence. The future lines of African colonisation have now been generally determined by agreement, but useful illustrations of the principles of occupation may still be drawn from the Oregon territory dispute between this country and the United States in 1844,<sup>1</sup> the Louisiana dispute between the latter country and Spain in 1803,<sup>2</sup> the Venezuelan boundary dispute between Great Britain and Venezuela in 1895-9,<sup>3</sup> and the Alaska boundary dispute between Great Britain and the United States referred to arbitration in 1903.<sup>4</sup>

**Islands.** Islands in the sea present questions of less difficulty. Here, again, much depends upon the facts, the size of the island and the nature of the occupation; but occupation of one part is more easily presumed to be occupation of the whole. *Prima facie* an island belongs to the nation within whose territorial waters it lies, but the presumption may be rebutted on proof of an adverse root of title. Islands which are formed by 'alluvium and increment' from the soil of a coast belong naturally to the state which owns that coast.<sup>5</sup>

**Res nullius.** Occupation can only come into play when there is a *res nullius* to be occupied,<sup>6</sup> but the requirement is of course satisfied when territories, previously occupied by a civilised country, are definitively relinquished. In the Santa Lucia negotiation between this country and France in 1763, it was admitted that abandonment for ten years may be treated as definitive. The Delagoa Bay dispute between this country and Portugal in 1875 established the principle that, when the

<sup>1</sup> *Parl. Papers*, iii, 1846, Oregon Correspondence; Twiss, *Oregon Question*, chap. iv; Hall, 7th ed. p. 112; Wheaton (ed. Phillipson), pp. 276 seq.; Moore, *Digest*, vol. i, § 80; vol. v, § 835.

<sup>2</sup> *British and Foreign State Papers*, 1817-1818. Hall, 7th ed. pp. 109, 110.

<sup>3</sup> Cf. Hall, 7th ed. p. 114; Moore, *Digest*, vol. i, § 88; vol. v, § 966.

<sup>4</sup> *British and Foreign State Papers*, vol. xii (1824-5), vol. lvii (1866-7), vol. lxxxiv (1891-2), vol. lxxxvi (1893-4), vol. xcvi (1902-3); Cobbett, *Cases*, vol. i, pp. 96 seq.

<sup>5</sup> *The Anna* (1805), 5 C. Rob. 373. The decision in this case was quite recently followed by the Privy Council: *Secretary of State for India v. Sri Raja Chellikani Rama Rao* (1916), 85 L.J.P.C. 222; 32 T.L.R. 652.

<sup>6</sup> It is doubtful whether the polar regions can be acquired by occupation, inasmuch as permanent settlement there is practically impossible; regions of moving ice can scarcely be regarded as territory. Cf. *Amer. Journ. of Int. Law*, vol. iii (1909), pp. 928 seq.; vol. iv (1910), pp. 265 seq. With regard to Spitzbergen, a conference which met at Christiania in June, 1914, consisting of delegates of Great Britain, Germany, France, Russia, Norway, Sweden, Holland, and the United States, attempted to reach an understanding whereby the islands should not be subjected to the exclusive sovereignty of any one state; but the meeting was adjourned. See *Amer. Journ. of Int. Law*, vol. viii (1914), p. 891.

power to control is never lost, occasional acts of sovereignty are sufficient to keep alive a title by occupation.

The question of African colonisation was considered at the Berlin Conference in 1885, and an agreement arrived at by all the great powers, including the United States, which is likely to avert misunderstandings in the future. The signatory powers bound themselves to acquire no land and assume no protectorates on the coast of Africa without notifying one another of their intentions; and they formally laid down the principle that occupation must be effective by recognising 'the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African continent, sufficient to protect existing rights and, as the case may be, freedom of trade and transit under the conditions agreed upon.'<sup>1</sup> It is possible that the convenience of the practice of notification may procure its reception in regions other than the African coasts. The articles as they stand do not cover even the whole of the African continent, and an attempt by Great Britain at the Conference to get them so extended met with no success; but Great Britain has already acted upon the principle of notification in the case of Bechuanaland, and France in the case of the Comino Islands.<sup>2</sup>

Conquest is by some writers used synonymously with effective military occupation;<sup>3</sup> in that case the possession of the occupant is only *de facto* and provisional. If conquest is identified with subjugation and annexation, then the possession of the annexing state becomes *de jure* and definitive. Several modern writers<sup>4</sup> deny that conquest is a legitimate means of acquiring territory, but however undesirable such a title may be, it must be admitted that, having regard to numerous examples of international practice<sup>5</sup> and to the fact that modern international law does not as yet contain a provision to the contrary, it is juridically valid. Protests may be made, and have frequently been made,<sup>6</sup> by defeated states and by third states against this mode of acquiring territory; but

<sup>1</sup> General Act of the Berlin Conference, Arts. 34, 35. *Parl. Papers, Africa*, No. 4, 1885. The 'conditions agreed upon' referred to the Congo Basin.

<sup>2</sup> Hall, 7th ed. p. 117n.

<sup>3</sup> Cf. Oppenheim, vol. i, p. 236; vol. ii, p. 264.

<sup>4</sup> e.g. Bonfils, § 535; Despagnet, § 863.

<sup>5</sup> Phillipson, *Termination of War and Treaties of Peace* (London, 1916), pp. 18, 19. See, however, the arguments of the present editor against forcible annexation; *ibid.* p. 29. As to the rights over Alsace-Lorraine in regard to conquest, see Phillipson, *Alsace-Lorraine: Past, Present, and Future* (London, 1918), pp. 143 seq., 149 seq.

<sup>6</sup> *Ibid.* p. 19.

until an international agreement is reached as against conquest, subjugation and forcible annexation, the title to such acquisition is legally valid, be it ever so reprehensible on the ground of morality. The pronouncement of one of the most eminent American judges, Chief Justice Marshall, may be recalled: 'Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinion of individuals may be respecting the original justice of the claim which has been successfully asserted.'<sup>1</sup> Very rarely have third states refused to recognise the new sovereignty asserted over effectively annexed territory.<sup>2</sup>

Cession.

Cession<sup>3</sup> is a formal mode of acquiring territory by a purely voluntary transfer, or by—what may be called—a *quasi*-voluntary transfer effected in a treaty of peace. From the point of view of the effects of the transfer on the resulting rights and liabilities of the parties concerned existing international law assimilates the latter kind to the former. Voluntary cessions may be made by way of gift, or sale (*e.g.* the purchase by the United States of Louisiana, Florida, Alaska), or exchange (*e.g.* Heligoland ceded to Germany in 1890 for East African territory handed over to Great Britain).<sup>4</sup>

Prescription.

The old Roman plea for prescription *ne dominia rerum diutius in incerto essent* applies in the abstract with equal force to international law, and the majority of writers are agreed that international rights may be acquired and lost by lapse of time. The doubts, however, suggested by G. F. de Martens,<sup>5</sup> Klüber,<sup>6</sup> Heffter<sup>7</sup> and others, as to whether the doctrine of prescription is applicable at all in international law, cannot be dismissed as entirely fanciful. In municipal systems the prescriptive acquisition of rights is ordinarily regulated by the maxim, *fraus omnia vitiat*, and so guarded, the limitation which ownership undergoes for its own protection does not come into conflict with the general conscience. In international law such a reservation has no place, and a fraudulent root of title is as good as another where time has consecrated the original offence.

It may be gravely doubted, however, whether in practice nations will submit to rules which bear hardly on their material interests, and which are easily evaded by reason of their vague-

<sup>1</sup> *Johnson v. McIntosh* (1823), 8 Wheat. 543, at p. 588; Scott, *Cases*, p. 71.

<sup>2</sup> See also *infra*, p. 288.

<sup>3</sup> See Phillipson, *op. cit.* pp. 277 *seq.*

<sup>4</sup> For the incidents and effects of cession, see *infra*, pp. 289 *seq.*

<sup>5</sup> *Précis du droit des gens moderne* (Paris, 1864), §§ 70, 71.

<sup>6</sup> *Le droit des gens moderne de l'Europe* (Paris, 1831), § 6.

<sup>7</sup> *Droit international*, § 12.



ness. The difficulty is increased by the failure of international law to supply positively a generally applicable period of prescription. The provision that rights may be acquired by enjoyment for a period, 'whereof the memory of man runneth not to the contrary,' implicitly requires that it shall be determined how deep are the roots that bind human memory to the past. To say 'rights may be prescriptively acquired, the precise period of prescription is uncertain,' is merely to recommend academically acquiescence in the *status quo*. It is, however, useful to observe that in some degree every civilised nation must ultimately fall back upon a prescriptive root of title. The recognition of the fact is often obscurely made, yet to its influence may be traced that instinctive reverence for 'accomplished facts,' which, as a force making for tranquillity, is of incalculable international importance.

As a recent example of international practice we may recall the Treaty of Washington (1897), entered into for the settlement by arbitration of the Anglo-Venezuelan boundary dispute, which prescribed the following rule, among others, for the guidance of the tribunal: 'Adverse holding or prescription during a period of fifty years shall make a good title. The arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription.'<sup>1</sup>

As a judicial authority in support of this view, a case that came before the Judicial Committee of the Privy Council may be referred to.<sup>2</sup> Lord Blackburn, delivering the judgment of the Court, held that Conception Bay in Newfoundland must be regarded as having become by prescription part of British territory, on the ground that Great Britain had, in point of fact, long exercised dominion over it, and that the claim of the British Government had been acquiesced in by other states so as to show that the bay had for a long time been in the exclusive occupation of Great Britain.

The nature of the rights involved in international ownership, or the *dominium eminens* of the state, which is not identical with the property of the state, is of a somewhat peculiar character. The right of eminent domain is a necessary corollary of the possession of territorial sovereignty. As Portalis said, *imperium* belongs to the sovereign head of the state, property belongs to its citizens. But as between two distinct

Eminent  
domain and  
ownership.

<sup>1</sup> Moore, *Digest*, vol. i, p. 297.

<sup>2</sup> *The Direct United States Cable Co. v. The Anglo-American Telegraph Co.* (1877), L.R. 2 App. Cas. 394.



communities, ownership may be described well enough in Austin's well-known words: 'The right over a determinate thing, indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration.' Such a right, though difficult to define positively, is familiar and intelligible enough in its general features. Greater difficulties beset the attempt to determine exactly the legal position where the claims are less exclusive: it is at this point that serious problems, already noticed from a slightly different point of view, are raised by the extensions of territory variously described as protectorates, spheres of influence, chartered company territory, and leasehold territory. It has been suggested already that a protected state controlled internally and externally by the protecting power has in fact become a part of its dominions, differing from the rest merely in the possession of a more likely prospect of future emancipation.

Spheres of  
influence.

A sphere of influence or interest is the phrase vaguely used to describe an area which the power enjoying it wishes to possess but is not prepared immediately to occupy.<sup>1</sup> It may be created by the unilateral act of one state or by agreement between two or more; and when created by agreement, the claim is frequently made that it must be respected even by those who have not been parties. Great Britain and Germany in 1886 agreed to draw a line in the Western Pacific and to refrain from interference with each other on either side of it. Germany in 1890 and the Congo State in 1894, by agreements with Great Britain, recognised a British sphere of influence extending to 'the western watershed of the basin of the Upper Nile';<sup>2</sup> and in the negotiations which followed the Fashoda incident in 1898, Great Britain set up a case of acquiescence, after notice, on the part of France, but the matter was settled by a further delimitation of spheres of influence between Great Britain and France, without any decisive conclusion on principle being arrived at. To proclaim a sphere of influence is in fact to say 'hands off' to possible competitors. No powerful state would allow foreign interference within the area of a sphere of influence, and the attempt to interfere would probably be treated as a *casus belli*; in these circumstances it is both convenient and accurate to include such spheres among the territorial belongings of a state. A further development of the tendency to assume vague and indefinite rights over areas

<sup>1</sup> Some writers regard the establishing of spheres of influence as incompatible with the principles of occupation: cf. Bonfils, § 561; Despagnet, § 396.

<sup>2</sup> Westlake, Part I, p. 132; Hertslet, *Map of Africa by Treaty*, p. 642.

of territory not occupied by the state which claims the rights, is to be found in the agreements made between China on the one hand and Great Britain, France and Japan on the other, in 1897 and 1898, by which China agreed not to alienate certain parts of her territory; each power thereby establishing a sort of prior claim in the event of the breaking-up of the Chinese Empire.

The latest concession to international sensitiveness is to Leases. be found in the 'leasehold interests' which the delicacy of continental diplomacy has introduced in the Far East, and for which precedents are to be found in the dealings between Great Britain and Zanzibar and Great Britain and the Congo State. The political advantage of such 'leases' (which some writers have described as 'disguised cessions') is to be found in the easy graduation of the assimilative process, but their legal importance is not considerable. At a given moment, authority and jurisdiction are resident either with the power which grants, or with that which receives, the lease. In the first case concessions of unusual scope and vagueness, but fully consistent with a continuance of the prior ownership, have been conventionally made; in the second there has been an actual transfer of territory from one power to the other. A rough but usually sufficient test is the incidence of responsibility to foreign powers. If a European country obtains a 'lease' from China, fortifies its acquisition, and undertakes responsibility within its limits, no devices of nomenclature can disguise the change which has been covertly effected.

## 2. RIGHTS OVER WATER

The high sea is free and common to all mankind for naviga- The ocean. tion and innocent use. It is an international highway that cannot be appropriated or subjected to the exclusive sovereignty or jurisdiction of any state, apart from certain rights of jurisdiction possessed by every state in respect of its own vessels, pirates, foreign vessels committing certain kinds of offences, and in case of war a belligerent's right to visit and search suspected neutral vessels. For many centuries, however, the ocean was generally admitted to be a possible subject of national appropriation. The character of the pretensions put forward was well stated by Cockburn, C.J.:<sup>1</sup>

'... From an early period the kings of England, possessing

<sup>1</sup> *R. v. Keyn (The Franconia)* (1876), 2 Ex. D. 63, at pp. 174-5.

more ships than their opposite neighbours, and being thence able to sweep the channel, asserted the right of sovereignty over the narrow seas, as appears from the commissions issued in the fourteenth century, of which examples are given in the Fourth Institute, in the chapter on the Court of Admiralty, and others are to be found in Selden's *Mare Clausum*, Book 2. At a later period still more extravagant pretensions were advanced. Selden does not scruple to assert the sovereignty of the King of England over the sea as far as the shores of Norway, in which he is upheld by Lord Hale in his treatise, "*De jure maris*," Hargrave's *Law Tracts*, p. 10.

'In the reign of Charles II Sir Leoline Jenkins, then the Judge of the Court of Admiralty, in a charge to the grand jury at an Admiralty Sessions at the Old Bailey, not only asserted the King's sovereignty within the four seas, and that it was his right and province "to keep the public peace on these seas"—that is, as Sir Leoline expounds it, "to preserve his subjects and allies in their possessions and properties upon these seas, and in all freedom and security to pass to and fro on them, upon their lawful occasions," but extended this authority and jurisdiction of the king:—

"To preserve the public peace and to maintain the freedom and security of navigation all the world over, so that not the utmost bound of the Atlantic Ocean, nor any corner of the Mediterranean, nor any part of the South or other seas, but that if the peace of God and the King be violated upon any of his subjects, or upon his allies or their subjects, and the offender be afterwards brought up or laid hold of in any of His Majesty's ports, such breach of the peace is to be inquired of and tried in virtue of a commission of oyer and terminer as this is, in such country, liberty, or place as His Majesty shall please to direct—so long an arm hath God by the Laws given to his vice-regent the King."

'To be sure, this learned civilian, as regards these distant seas admits that other sovereigns have a concurrent jurisdiction, which, however, he by no means concedes to them in these so-called British seas. In these the refusal by a foreign ship to strike the flag and lower the topsail to a King's ship he treats as amounting to piracy.

'Venice, in like manner, laid claim to the Adriatic, Genoa to the Ligurian Sea, Denmark to a portion of the North Sea. The Portuguese claimed to bar the ocean route to India and the Indian seas to the rest of the world, while Spain made the like assertion with reference to the West.'



The claim was sometimes pushed to practical consequences. Thus, in 1636, England compelled the Dutch to pay £30,000 for the privilege of fishing in the German Ocean, and more than one war between England and Holland sprang from the refusal of the Dutch to lower their flag in recognition of the maritime sovereignty of the former country. Until 1805 British naval officers were instructed by the Admiralty regulation to compel foreign ships to 'strike their topsail and take in their flag' within the king's seas, which were declared to extend to Cape Finisterre. But, as Cockburn, C.J., expressed it, 'these vain and extravagant pretensions have long since given way to the influence of reason and common-sense,'<sup>1</sup> and the American attempt to revive them at one stage of the Alaska Territory dispute was not seriously pressed. The American claims to an extent of water 1500 miles by 900 were, ironically enough, derived from a Russian ukase, the revocation of which the United States had been instrumental in procuring. The arbitration tribunal, which gave its decision in 1893, made short work of the attempt to extend the territorial jurisdiction of Alaska. *Nemo dat quod non habet*, and the Emperor Alexander I could not pass on to the United States jurisdiction which he himself had illegally assumed.

Extravagant  
claims.

It may now be stated quite generally that the sea lies open to the unimpeded navigation of all, but that an exclusive jurisdiction may be asserted by each country over that portion of it which is closely adjacent to its own territory—this portion of the sea having been variously designated territorial, littoral, marginal, or jurisdictional.<sup>2</sup> All vessels enjoy the right of innocent passage through the territorial sea,<sup>3</sup> subject to the right of belligerent states to prescribe regulations for such passage or prohibit it altogether for reasons of self-defence, and subject to the right of neutrals to regulate the passage of the

Territorial  
sea.

<sup>1</sup> *R. v. Keyn*, p. 175. As lately, however, as 1837, Captain Furneaux, R.N., in his *History of Treaties*, observes (Preface, xiii): 'The limits of the British jurisdiction on the seas extend generally from Cape Stadelard in Norway to Cape Finisterre. . . . In having permitted a silence in most of her treaties at the termination of the late war . . . on the question of nations navigating unconditionally in the British seas, England has evinced a spirit of moderation, and proved that she does not contend for a vexatious exercise of power.' The writer judiciously adds: 'It is to be hoped the blessings of peace may long permit us to regard these questions as of no vital importance to the interests of Great Britain.'

<sup>2</sup> Cf. Bonfils, *Droit international*, § 491.

<sup>3</sup> This is the most important, if not the only, international servitude. The list of international servitudes given by some writers and the theory expounded by them are for the most part untenable.



warships of belligerents.<sup>1</sup> The precise extent of the area covered by such a qualification as territorial, littoral, etc., was not unnaturally a source of contention among the earlier sovereigns and jurists, whose claims were not infrequently based on artificial or fantastic measures. Albericus Gentilis allowed one hundred miles from shore, Valin as far as the lead line could find bottom, while Baldus and Bodin<sup>2</sup> were content with sixty miles. The principle already indicated by Grotius<sup>3</sup> was clearly stated by Bynkershoek, 'potestatem terræ finiri ubi finitur armorum vis'—land control ends with the range of weapons. Control over the sea, he says, extends 'quousque tormenta exploduntur'<sup>4</sup>—as far as the range of offensive weapons, which is the extent of effective protection, and this range appears to have then been roughly about three nautical miles. The same writer, therefore, proposed the three-mile limit, which has since been generally adopted.<sup>5</sup> Thus it has been accepted in numerous recent international conventions and municipal Acts, e.g. the Russian Prize Regulations (1869), the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), French Regulations (1888), North Sea Fisheries Convention (1882), Suez Canal Convention (1888), Behring Sea Convention (1893), etc. It is, however, material to notice that the limit was in the first place appointed in reliance upon data which are no longer applicable; *cessante legis ratione cessat et ipsa lex*, and it is contended that it is reasonable to extend the area of control coincidently with the increasing range of artillery. In 1806 the American Government suggested to Great Britain a six-mile limit, but refused in 1863 to recognise such a range proposed by Spain in regard to Cuba; and in 1864 the United States suggested a five-mile limit to England.<sup>6</sup> The latter, however, has consistently been in favour of the three-mile limit; though for revenue and health purposes she and other countries (e.g. France and United States) have extended the jurisdictional zone beyond that limit.<sup>7</sup> Again,

<sup>1</sup> For regulations of this kind see *Rev. gén. de droit int. pub.* (Paris), vol. xx, p. 20.

<sup>2</sup> *La République* (Paris, 1577), i, c. 10, p. 170.

<sup>3</sup> *De jure belli ac pacis*, lib. ii, c. 3, §§ 13, 14.

<sup>4</sup> *De dominio maris*, c. 2.

<sup>5</sup> As to the earlier claims to maritime sovereignty, and the contribution of Bynkershoek to the controversy, see the article on this jurist by C. Phillipson, in *Great Jurists of the World*, pp. 398 seq.

<sup>6</sup> Moore, *Digest*, vol. i, §§ 146, 152.

<sup>7</sup> e.g. the British Hovering Acts of 1736, 1784, now superseded by the Customs Consolidation Act, 1876; the American Acts of 1797, 1799, and 1807. As to Great Britain, see Sir F. T. Piggott, *Nationality*, etc. (London, 1907), vol. ii, pp. 40 seq.; for the United States, see Moore, *Digest*, vol. i, p. 726; for France, see Pradier-Fodéré, *Droit international*, vol. ii, § 173.

the *Traité des Prises Maritimes*,<sup>1</sup> published in 1855, lays it down that the *portée du canon* is the proper limit of territorial waters, and in 1894 the Institute of International Law unanimously recommended that the limit be six miles, if the range of cannon-shot did not go beyond this.<sup>2</sup> In a recent case in which the question has come up for consideration (the Newfoundland Fisheries Arbitration of 1910) the three-mile limit was prescribed by treaty, and therefore no question as to its reasonableness arose.<sup>3</sup>

With regard to bays and gulfs, in theory their character as territorial or free is a matter of measurement, the material point being their width at the mouth; but by ancient usage certain bays or gulfs, such as those of Conception<sup>4</sup> in Newfoundland (British), Chesapeake, Delaware and Cape Cod Bay<sup>5</sup> (American), and Cancale (French), have a national character, though far wider than six miles at their entrance. In a case before the Privy Council<sup>6</sup> in 1877, Lord Blackburn, delivering the judgment of the Court, pointed out that the authority of the English common law on the subject was slender and vague: thus Coke and Hale said that branches of the sea 'might' be deemed to be within the body of the adjoining country where a man may reasonably 'discerne' between shores. He referred to a case decided in 1859,<sup>7</sup> where it was held that the whole of the inland sea between the counties of Glamorgan and Somerset was to be regarded as belonging to the counties by whose shores its several parts were respectively bounded; and whether a branch of the sea was to be treated as part of the adjoining territory was determinable by established usage. With regard to the law of nations, said Lord Blackburn, it was universally agreed that harbours, estuaries and land-locked bays belong to the country of the state possessing the shores round them; but there was no agreement as to the meaning of 'bay' for this purpose. Various views had been expressed by writers, e.g. defensibility from the shore, the range of one

<sup>1</sup> By A. de Pistoye et C. Duverdy (Paris, 1855), vol. i, p. 94.

<sup>2</sup> *Annuaire*, vol. xiii, p. 329.

<sup>3</sup> See pp. 170 seq., *infra*, for an account of this arbitration.

<sup>4</sup> *Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1877), L.R. 2 A.C. 394.

<sup>5</sup> Moore, *Digest*, vol. i, pp. 735 seq. See the case of *The Grange* (1793), *Opinions of U.S. Att.-Gen.*, vol. i, p. 32; and *The Alleganean* (1885), Scott, *Cases*, p. 143.

<sup>6</sup> *Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1877), 2 A.C. 394. Cf. *A.-G. for British Columbia v. A.-G. for Canada* [1914], A.C. 153, at p. 174; *The Lokken* (1918), *The Times*, July 27, 1918.

<sup>7</sup> *R. v. Cunningham* (1859), Bell, Cr. Cas. 86.

cannon-shot from shore to shore (or three miles), a cannon-shot from each shore (or six miles), an arbitrary distance of ten miles, and so on; so that there is no agreement on the question.

King's  
Chambers.

A somewhat extensive claim has been made, though its validity is doubtful, in respect to those portions of the sea which form the ports, harbours, bays and mouths of rivers of any state where the tide ebbs and flows; thus under the name of the King's Chambers this country has claimed jurisdiction over the water enclosed between straight lines drawn from headland to headland, but it is believed that such claims have now been renounced. A similar claim, but one proportionately more imposing, was put forward by Chancellor Kent<sup>1</sup> on behalf of the United States: 'Considering the great extent of the line of the American coasts, we have a right to claim, for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as for instance from Cape Ann to Cape Cod and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of Florida to the Mississippi. It is certain that our Government would be disposed to view with some uneasiness and sensibility, in the case of war between other maritime powers, the use of the waters of our coast, far beyond the reach of cannon-shot, as cruising ground for belligerent purposes.'<sup>2</sup>

With this view, however, may be compared the opinion expressed by an American Secretary of State in 1875, in a dispatch to this country: 'We have always understood and asserted that pursuant to public law no nation can rightfully claim jurisdiction beyond a marine league from its coast.'

In the Newfoundland Fisheries Arbitration of 1910 between Great Britain and the United States,<sup>3</sup> it was decided by the Hague Tribunal that the three-mile limit was to be measured in the case of a bay from a straight line drawn across the body

<sup>1</sup> *Commentaries on American Law* (ed. 1844), vol. i, p. 29.

<sup>2</sup> With regard to such statements as this, a recent American writer aptly says: 'The vague and shadowy claims to jurisdiction for domestic purposes over large portions of the Atlantic Ocean and Gulf of Mexico sometimes made by American publicists in behalf of the United States have been taken too seriously by continental authorities.' A. S. Hershey, *The Essentials of Public International Law* (New York, 1912), p. 201n.

<sup>3</sup> G. G. Wilson, *The Hague Arbitration Cases* (Boston and London, 1915), p. 134.



of water at the place where it ceases to have the configuration and characteristics of a bay; but as this finding was recognised to be so vague as to leave the door open to disputes in practice, a number of bays in New Brunswick, Nova Scotia and Newfoundland were specifically dealt with in detail, and it was suggested that in other cases the line should be drawn across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles. This ten-mile rule had been adopted by Great Britain as the test whether the fishing was reserved to nationals in treaties with France and Germany and in the North Sea Convention, and had been proposed by her in the course of negotiations with the United States.<sup>1</sup>

Lakes and land-locked seas not directly communicating with the ocean and wholly surrounded by the land territory of a single state form part of the dominions of that state. But if two or more states border on such a sea or lake, then it would follow from the general principle appertaining to the high sea that all the adjacent states possess equal rights of navigation thereon and rights of jurisdiction in their respective territorial zones. Some authorities, indeed, have maintained that such a sea or lake belongs, subject to special conventions providing otherwise, to the various littoral states in proportional parts, the boundary lines running through the centre. But this view is less acceptable, owing to the inevitable inconveniences that would arise in practice. An example of a special arrangement by treaty is found in the case of the Caspian Sea: by the treaties of Gulistan (1813) and Tourkmantchai (1828) between Russia and Persia, it was placed under the control of Russia, which alone became entitled to maintain warships on it.

An inland sea connected with the main ocean by a navigable channel or strait cannot, in principle, be regarded as a closed sea, unless all its shores and both sides of the channel or strait belong to the same sovereign, *e.g.* the Sea of Azof. Where there are several littoral states, navigation—at all events of a commercial character—should be free to all; and the state within whose jurisdiction fall the shores of the communicating channel ought not to interfere with navigation, except to impose reasonable rules applied equally to all with a view to regulating access and facilitating the orderly passage. The exclusion of vessels from the channel might well come into conflict with the rights of independence and self-preservation

<sup>1</sup> See pp. 170 *seq.*, 173, *infra*.



of the various riparian states. In actual practice these rules are observed, and it is probable that they have now become part of customary international law, though several jurists have expressed a doubt on the point. Further, where the communicating channel is of considerable breadth—the limit of which, however, has not been fixed, some writers saying six miles, others holding when it is beyond the power of the possessor to control it effectively by shore batteries—then the sea in question must be considered an open sea free to all.

The Baltic Sea.

The Baltic Sea has always been held to be an open sea under the law of nations, although the Northern powers have sometimes claimed the right to exclude therefrom the warships of belligerents. The neutrality of the Baltic was stipulated in treaties between those powers, *e.g.* in 1653 between Denmark and Sweden, in 1759 and 1760 between these countries and Russia; and in 1780 the Declaration of Armed Neutrality was signed by the same powers (subsequently joined by others), who claimed that the Baltic Sea was a closed sea, and bound themselves to defend it and its coasts from all 'hostilities, piracy and violence.' But in each case acquiescence in such a restrictive rule on the part of the other powers was only temporary and had regard to a particular war; so that the rule could not and did not acquire general applicability. Moreover, the Treaty of Copenhagen, 1857, and other treaties consequent thereon, impliedly recognised that the Baltic Sea was a *mare liberum*.

The Black Sea.

The Black Sea<sup>1</sup> was formerly regarded as a Turkish lake, because it lay, together with the channels of communication, entirely within Turkish territory. After Russia had extended her empire to the shores of the Euxine and her new position had been recognised by Turkey in various treaties—notably in that of Kutchuk-Kainardji, 1774—the status of the Black Sea was changed. By the Treaty of Paris, 1856, the Black Sea was neutralised, that is, merchantmen alone continued to enjoy the right of access, the entrance by warships (except certain light armed vessels for police purposes) being expressly prohibited. Russia finding this restriction obnoxious and intolerable—it was certainly inconsistent with the dictates of justice and equity—denounced the objectionable provisions of the treaty in 1870, which were expunged by the Treaty of London, 1871.

Hudson Bay. The Hudson Bay lies wholly within Canadian territory, and

<sup>1</sup> See C. Phillipson and N. Buxton, *The Question of the Bosphorus and Dardanelles* (London, 1917).

possesses some of the characteristics of an inland sea; but its entrance is fifty miles wide. The claims of the Canadian Government to exclusive sovereignty and jurisdiction over it are contested in the United States, on the ground that the great width of its entrance prevents it from occupying the position of a territorial sea, and that under treaty rights and long-established usage American fishermen enjoy the right of fishing therein.<sup>1</sup>

Subject to special treaties regulating certain straits, the following rules are considered to be applicable to straits in general:

(a) Where a strait communicates with a *closed* sea, and both of its shores as well as that sea belong to one power alone, whose shore batteries can effectively control it, then such strait forms part of the territorial dominions of that power, which is therefore entitled to exclude foreign warships from it at all times. But in the interests of peaceful international commerce, the right of innocent passage should be conferred on foreign merchantmen.

(b) If a strait leads to an *open* sea, and both of its shores belong to one state, the latter may adopt all necessary measures for its own safety and so is entitled, when it becomes a belligerent, to exclude foreign warships from and forbid the transport of foreign troops through that strait.

(c) If a strait more than six miles wide lies between the territories of different states, each state is entitled to exercise the rights of sovereignty and jurisdiction over its own territorial waters in the strait, that is, to a distance of three marine miles below the low-water mark. If the strait is less than six miles wide, each state may exercise such rights to the line running through the mid-channel.

(d) Where a right of innocent passage exists, an adjacent state has no right to impose tolls, with the exception of reasonable charges necessary for the maintenance of buoys, light-houses, pilots, etc.

An exception to the last principle was, till 1857, found in the case of the Belts and the Sound, over which Denmark had for a long time exercised sovereignty. Owing, however, to the increasing recognition of freedom of navigation, and to the discontent of nations whose vessels were often unduly detained through the exaction of tolls, an arrangement was

The Sound  
and the  
Belts.

<sup>1</sup> See an article by P. J. McGrath, in *Fortnightly Review*, Jan. 1908; and by T. W. Balch, in *Amer. Journ. of Int. Law*, vol. vi (1912), pp. 409 *seq.*

made by the Treaty of Copenhagen, 1857, between the chief maritime powers of Europe and Denmark, whereby the latter was to cease levying these tolls, but was to continue to maintain buoys and lighthouses, and superintend the pilotage, imposing the same dues therefor on foreign as on Danish vessels; and the rate of transit charges was fixed. In return, the other powers paid Denmark an indemnity, which was divided among the contracting parties in certain proportions. Similar conventions were soon afterwards made with other European powers, and (in 1858) with the United States.

Straits of  
Magellan.

As to the Straits of Magellan, there was a long-standing dispute between the adjoining states, Chile and the Argentine Republic, each of which claimed exclusive sovereignty. In 1879, however, the United States intimated that such claims would not be acquiesced in; and in 1881 a settlement was arrived at by the Treaty of Buenos Ayres, which limited the jurisdiction of both riparian states. Art. V provided: 'Magellan's Straits are neutralised for ever, and free navigation is guaranteed to the flags of all nations.' (It may be added that the term 'internationalisation' is more appropriate than 'neutralisation' to describe the status of these straits as well as of Suez Canal and Panama Canal.) Further, the contracting parties bound themselves not to construct fortifications and military works on the banks of the straits.

Straits of  
Gibraltar.

With regard to the Straits of Gibraltar, the Anglo-French Agreement, April 8, 1904, respecting Egypt and Morocco, declared (Art. VII): 'In order to secure the free passage of the Straits of Gibraltar, the two Governments agree not to permit the erection of any fortifications or strategic works on that portion of the coast of Morocco comprised between, but not including, Melilla and the heights which command the right bank of the River Sebou. This condition does not, however, apply to the places at present in the occupation of Spain on the Moorish coast of the Mediterranean.'

The Bos-  
phorus and  
the Dar-  
danelles.

The Bosphorus and the Dardanelles<sup>1</sup> occupy a special position regulated by a series of treaties. When the territories surrounding the Black Sea as well as these straits belonged to Turkey, the Porte could lawfully exclude therefrom not only foreign warships but also merchantmen. As soon as Russia had definitely acquired possessions on the Black Sea, the Porte was obliged to allow the passage of foreign merchantmen through the Straits to and from the Black Sea, but not

<sup>1</sup> See C. Phillipson and N. Buxton, *The Question of the Bosphorus and Dardanelles* (London, 1917).



in the case of warships. The Porte claimed to exclude the latter, in conformity with the 'ancient rule of the Ottoman Empire,' which was expressly recognised by Great Britain in 1809 in her treaty with Turkey, viz. the Peace of the Dardanelles, whereby the Sultan bound himself to observe the rule of exclusion. The Treaty of London, 1841—the first important Straits Convention—between Turkey on the one hand and Great Britain, France, Prussia, Russia and Austria on the other, affirmed the 'ancient rule,' which thus became, for practical purposes, a rule of European public law. Under the Straits Convention annexed to the Treaty of Paris, 1856, the Sultan engaged not to admit, so long as he was at peace, any foreign warship into the Bosphorus and Dardanelles; but he was empowered to authorise the passage of light armed vessels employed in the service of the foreign legations. The Treaty of London, 1871, however, whilst recognising this principle of closing the Straits, empowered the Sultan to open them in time of peace to the warships of friendly and allied powers, if he thought it necessary to do so for the purpose of enforcing the stipulation of the treaty of 1856. This régime was affirmed by the Berlin Congress, 1878. Many serious difficulties have arisen in the application of the provisions of 1871; and in 1904 Russia evaded them by sending through the Straits the *Smolensk* and the *Peterburg*, armed cruisers disguised as merchantmen, and then using them to exercise belligerent rights in regard to neutral shipping. In 1912 Turkey laid mines in the Dardanelles to prevent the approach of the Italian fleet, and neutral merchantmen were for a time thereby unjustifiably excluded. Again, in 1914 the Porte allowed the German cruisers, the *Goeben* and the *Breslau*, to pass the Dardanelles and commit acts of war in Turkish territorial waters: this involved a breach of the Straits Convention, as well as of the duties of neutrality imposed by the Hague Convention and international law in general. It is obvious that a new and more satisfactory régime for the Bosphorus and the Dardanelles is urgently called for.

The rules applicable to interoceanic canals ought, in principle, to follow those relating to straits, conformably to the fundamental principles that have been set forth above. Accordingly such canals as are waterways for international traffic should be open—subject to special treaty stipulations to the contrary—not only to the merchantmen, but also to the warships of all nations for the purpose of innocent passage, with

Interoceanic  
canals.



no more than those restrictions which apply to straits. In order, however, to defray the cost of construction and maintenance, reasonable tolls may be imposed. These principles (added to various other provisions) have been expressly incorporated in the international conventions relating to the Suez Canal and the Panama Canal.

Suez Canal.

As to the Suez Canal, the Treaty of Constantinople, 1888 (usually designated the Suez Canal Convention), lays down the following rules: (1) The canal is open in time of war, as in time of peace, to all vessels, either merchantmen or warships, belonging either to neutral states or to belligerents. (2) No acts of hostility may be committed within the canal or its ports of access, or in the sea to a distance of three marine miles from either end of it. (3) The entrances to the canal may not be blockaded. (4) No permanent fortifications may be erected. (5) The warships of a belligerent may not revictual or take on stores in the canal, embark or disembark troops, or stay in the canal or ports of access more than twenty-four hours, except in case of necessity as provided; the same provisions being applicable to prizes. (6) If vessels of different belligerents are in the canal or ports of access at the same time, a period of twenty-four hours is to elapse between the departure of any vessel belonging to one belligerent and that of any vessel belonging to his adversary. (7) Warships may not be stationed inside the canal; but each power, not being a belligerent, may station two warships in the ports of Suez or Port Said.

Panama Canal.

The provisions relating to the Panama Canal, as adopted in the Hay-Pauncefote Treaty of 1901 between Great Britain and the United States, are in substantial agreement with those stipulated for the Suez Canal. There is one noteworthy difference, however—the erection of fortifications is not prohibited in the treaty of 1901; so that the United States is not debarred under this arrangement from constructing such works—indeed, in the treaty of 1903 with Panama, this right is expressly recognised.

Rivers.

In deciding on the ownership of rivers which divide two states, various rules have been adopted. The oldest method, derived from the Roman law, was to take the middle line of the water; a later method was to take the course of the strongest current (the *thalweg*, or 'downway');<sup>1</sup> and in some cases,

<sup>1</sup> In the case of *Iowa v. Illinois* (1893), 147 U.S. 1, the expression 'middle of the Mississippi River' was interpreted as the 'middle of the main channel' or 'thread of the stream.'

either by convention or prescriptive right, one state is entitled to the whole river.<sup>1</sup>

A difficulty has been sometimes felt in dealing with those rivers whose waters flow over the territory of more than one country. The riparian inhabitants of a stream which disembogues itself into the sea in foreign territory are deeply concerned to maintain an open passage; and this interest combining with a general perception that wantonly to deny such passage was an unfriendly act, has introduced some confusion into the law. Under Roman law<sup>2</sup> navigable rivers were deemed to be public property, so that everybody enjoyed the right to pass freely over them, to use their banks (*jus littoris*) for anchoring vessels, lading and unlading cargo, etc.—a right that could not be restricted by the claims of private property. But such a disposition was not a rule of the law of nations. Grotius<sup>3</sup> himself and many of his most eminent successors failed to distinguish between the obligations of comity and of law, and based the right of free navigation on the principle of 'natural right.' Vattel<sup>4</sup> recognises a right, but calls it 'imperfect'; a not very happy way of saying that in his opinion, free river transit should be enforceable upon all nations, but in fact is not. The right of innocent passage has been several times alleged by American diplomatists.

In 1783, in a dispute with Spain over the closing of the Mississippi, the freedom of rivers to 'riparian inhabitants was declared to be a sentiment written in deep character in the heart of man,' a reference to authority which recalls the older appeals to the law of nature. In the St. Lawrence dispute between the United States and this country in 1824, the same claims were supported by similar arguments. 'The right of the upper inhabitants to the full use of a stream rests upon the same imperious want as that of the lower, upon the same inherent necessity of participating in the benefit of the flowing element.'<sup>5</sup> Similarly, in 1792 the French Convention, considering the status of the Scheldt which had been closed by the Treaty of Münster, 1648, declared that 'river courses are the common and inalienable property of all the countries through which they flow; that a nation cannot, without injustice, claim the exclusive right of occupying the channel of a river

<sup>1</sup> Westlake, Part I, pp. 144, 145.

<sup>2</sup> *Instit.* lib. i, t. i, §§ 1-5.

<sup>3</sup> *De jure belli ac pacis*, lib. ii, c. 2, § 13.

<sup>4</sup> *Droit des gens*, liv. ii, §§ 104 seq., 129. Cf. Puffendorf, *De jure naturæ et gentium*, lib. iii, c. 3, § 8.

<sup>5</sup> *British and Foreign State Papers*, 1830-31, pp. 1065-1075; cf. Hall, 7th ed. p. 135.

and prevent the neighbouring countries situated on its upper waters from enjoying the same advantage.' These somewhat rhetorical statements are hardly supported by either theory or practice; on the face of it the claim is exceptional, and an undischarged onus rests upon those who affirm it; in practice it has not been admitted, and the right of transit has been ordinarily secured by convention.

The parties to the Treaty of Paris in 1814 declared the Rhine free,<sup>1</sup> and expressed a hope that all rivers traversing different states should be free to the world, but the Congress of Vienna in the following year used language which apparently restricted this freedom to freedom of commerce, not of navigation, among the co-riparian states, not the nations of the world; though the wider construction was put upon it by the Treaty of Paris in 1856, which applied the principles of the Congress of Vienna to the Danube, and declared that no toll should be levied which was founded solely upon the fact of the navigation of the river, and no duty upon the goods on board the vessels, and that apart from police and quarantine regulations (which were to impose as little hindrance as possible) no obstacle should be opposed to free navigation.<sup>2</sup> The establishment of a European commission (which possesses many attributes of international personality) for the purpose of carrying out the regulations respecting the Danube is an important landmark in the development of international association and organisation. In 1831 the freedom of the Scheldt, which had been established by a decree of the French Convention in 1792, was reaffirmed by the treaty of separation between Belgium and Holland. The Treaty of San Lorenzo el Real in 1795 finally opened the whole of the Mississippi to American navigation after a long dispute with Spain, which claimed exclusive rights for a considerable distance above the river's mouth;<sup>3</sup> but this river is now entirely in the territory of the United States. The St. Lawrence controversy, already referred to, was settled in 1854 by a treaty between this country and the United States, under which the American Government purchased the freedom of the St. Lawrence by throwing open Lake Michigan to English commerce, and by the Treaty of Washington in 1871 this river was declared to be for ever free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations not incon-

<sup>1</sup> Cf. Wheaton (ed. Phillipson), pp. 310, 311.

<sup>2</sup> Westlake, Part I, p. 152.

<sup>3</sup> Wheaton (ed. Phillipson), pp. 312-315.



sistent with the privilege of free navigation.<sup>1</sup> With regard to African rivers, by the General Act of the Berlin Conference, 1885, the navigation of the Congo and the Niger was declared free to the commerce of all nations, except for the transport of articles destined for a belligerent and regarded as contraband of war.<sup>2</sup>

### 3. RIGHTS OVER THE AIR-SPACE

The question of a state's rights in regard to the air-space above its territory has become in recent years one of the most vital of all modern questions.<sup>3</sup> War in the air which was yesterday a figment of the imagination has to-day become a dreadful reality. Owing to the rapid development of aerial locomotion and to the certainty of still greater inventions in the future, the air regions will become an important highway of commerce and communication, and—unless war is to be abolished—the predominating scene of future warfare. It will be incumbent on the nations of the world, therefore, to arrive at clearly-defined rules regulating the rights and obligations of states and subjects with regard to the use of the air.

No international rules have yet been established on the subject.<sup>4</sup> Various suggestions have been made by writers in many countries; but they are far from agreement. Indeed, there is by no means a consensus of opinion in respect of the governing fundamental principle, on which will depend the subsidiary provisions, viz. whether the air is free to all, or whether it belongs exclusively to that state over whose territory it extends. Some writers, following a doctrine of the Roman law that the air, like the high seas, is naturally common to all, forget that the provision had reference to one mode of using the air, viz. for breathing; others, mindful of another doctrine of the civil law appertaining to the private ownership of land—a doctrine which has found its way into the municipal law of

<sup>1</sup> Wheaton (ed. Phillipson), pp. 315-320.

<sup>2</sup> Hertslet, *Map of Africa by Treaty*, p. 20; *Parl. Papers, Africa*, No. 4 (1885), pp. 308-311.

<sup>3</sup> The literature on the subject has rapidly increased of late years; we may mention here only the following: H. D. Hazeltine, *The Law of the Air* (London, 1911); J. M. Spaight, *Aircraft in War* (London, 1914); E. d'Hooghe, *Droit aérien* (Paris, 1912). Further references will be found in Oppenheim, vol. i, § 174.

<sup>4</sup> An international conference, to which many states sent representatives, met at Paris in May, 1910, to consider the question of aerial navigation; the attempt to arrive at a body of rules proved futile, and the conference adjourned *sine die*. With regard to a belligerent's wireless telegraphy in relation to neutrality, see *infra*, p. 316.



nations—hold that he who owns land owns also the air above it to an indefinite extent: *cujus est solum ejus est usque ad cælum*. But here the ownership of the air itself has not infrequently been confused with that of the air space. Further, the proposal has been made—on the basis of an analogy between the sea and the air—that just as maritime states exercise sovereignty over their territorial waters, so should all states exercise sovereignty over a defined air zone above their respective territories. But a difficulty at once arises in regard to the limitation of such a zone; how is it to be measured, and how is the measurement to be discernibly indicated? The various distances suggested by some writers are arbitrary and fantastic, and their acceptance is simply impossible. Furthermore, even if such a zone were delimited, and the supervening regions of air were therefore considered to be free, like the high sea, there would still be the same danger to a state if airmen were allowed unrestrained freedom to navigate those regions. In point of fact, the analogy that has been assumed between the air space and the sea is fallacious—longitudinal extension of water is a category profoundly different from the vertical extension of air.

Having regard to these considerations, it is submitted that the only sound basic principle is that each state necessarily possesses at all times a right of exclusive sovereignty over the entire aerial space above its soil and its territorial waters, and that foreign aircraft can possess no right of navigation in it, not even the right of innocent passage through it, save by the licence of the sovereign state—a licence that would, of course, be provided for by express agreement based on terms of reciprocity.<sup>1</sup>

#### 4. RIGHTS OVER MISCELLANEOUS OBJECTS

Under this head must be shortly considered the rights which states possess over property which is not situated within the territory, whether or not such property is within the jurisdiction of another state. In this class fall all vessels, public and private, which are outside the territorial waters of the

<sup>1</sup> In the regulations made by the United States, in November, 1914, for the use of the Panama Canal by vessels of the belligerents, air-craft of the belligerents were forbidden to pass through the air-space above the land and water in the canal zone within her jurisdiction. Similarly, on the occasion of a British air-craft attack on Zeppelin sheds at Friedrichshafen, Nov. 21, 1914, Switzerland laid claim to exclusive sovereignty over the air-space above her territory, and soon afterwards Holland made a like claim (*The Times*, Dec. 8, 1914).

country whose flag they fly. Jurisdictional rights over ships will require treatment elsewhere, but it is convenient to notice in this place the general character of such vessels.

Public vessels are all vessels in the exclusive employment of the state whether such employment be permanent or occasional. The public character of the vessel must be established by such a commission to the commander as will be recognised in his own country. The production of his commission by the commanding officer is sufficient evidence of the character of his vessel, and in practice his word is usually accepted. When the United States Government protested against the reception of the *Sumter* in Curaçao Harbour, the Dutch Government attempted to evade responsibility by the contention that 'le gouverneur néerlandais devait se contenter de la parole du commandant couchée par écrit.'<sup>1</sup> An affirmation by a Government that a particular vessel is a public ship of the state is of course conclusive. Thus in *The Parlement Belge*,<sup>2</sup> Brett, L.J., delivering the judgment of the court, observed: 'The ship has been declared by the Sovereign of Belgium, by the usual means, to be in his possession as Sovereign, and to be a public vessel of the state. It seems very difficult to say that any court can inquire, by contentious testimony, whether that declaration is or is not correct. To submit to such an inquiry before the court is to submit to its jurisdiction. It has been held that if the ship be declared by the sovereign authority by the usual means to be a ship of war, that declaration cannot be inquired into. That was expressly decided under very trying circumstances in the case of *The Exchange*.'<sup>3</sup> Whether the ship is a public ship used for national purposes seems to come within the same rule.'

A private ship, to make good its claim to nationality, must have conformed to the rules imposed by the state to which it claims to belong. Such rules will ordinarily deal with the flag under which it sails, or the nationality and domicile of its owners. The question may be reserved for a later chapter.

<sup>1</sup> Ortolan, *Diplomatie de la Mer*, i, 183; Hall, 7th ed. p. 172.

<sup>2</sup> (1878), 5 P.D. at p. 219.

<sup>3</sup> (1812), 7 Cranch, 116.

## CHAPTER III

### RIGHTS AND DUTIES INCIDENT TO JURISDICTION

THE subjects which require treatment under the head of jurisdiction are arranged in the following order:—

1. Jurisdiction within the territory.
2. Exemptions from the above jurisdiction.
3. Jurisdiction outside the territory.

#### I. JURISDICTION WITHIN THE TERRITORY

A state enjoys rights of jurisdiction in varying degrees over (1) its natural-born subjects, until such persons have changed their nationality in a manner recognised by its laws; (2) naturalised subjects; (3) aliens resident in, or passing through, its territory.

Natural-born subjects.

Normally, of course, a child is born in the country to which its parents belong, and no question can arise as to its nationality. Where, however, it is born in a country in which its parents are aliens, two different views are possible. According to the first, which was at one time almost universally held, territorial considerations were paramount, and the child's nationality was determined by the place of its birth (*jus soli*); according to the second the decisive criterion was the nationality of the father (*jus sanguinis*), and the place of birth was treated as accidental. A rigid adherence to the earlier view would have involved the conclusion that a child born in France of an English mother on her way to Switzerland was a French subject, while the later would have made it possible to impress as British subjects naturalised American citizens of British extraction to the third or fourth generation. Both the territorial principle, and that which depended upon parentage, were, in fact, incapable of extreme logical application. It is not surprising to find that under these circumstances national practice varied.

English practice.

By the English common law all persons born on English soil or on board English ships of war even when in foreign harbours, or on board any English ship at sea, were British subjects, and statutory additions thereto declared the children



and paternal grandchildren of natural-born subjects<sup>1</sup> to be themselves British subjects wherever born. And such nationality could not be affected by naturalisation elsewhere. In the language of Blackstone: 'It is a principle of universal law that the natural-born subject of one prince cannot by any act of his own—no not by swearing allegiance to another—put off or discharge his natural allegiance to the former; for this natural allegiance was intrinsic and primitive, and antecedent to the other; and cannot be divested without the concurrent act of that prince to whom it was first due. Indeed the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another, but it is his own act that brings him into these straits and difficulties of owing service to two masters; and it is unreasonable that by such voluntary act of his own he should be able at pleasure to unloose those bands by which he is connected to his natural prince.'<sup>2</sup>

Statute law has made great inroads upon this doctrine, but it still represents the general rule in England.

The American view was similar, with an exception, how- Foreign  
ever, in the case of the children of aliens whose residence is practice.  
merely transient; though an Act of Congress passed in 1855 declared that the children of American fathers born abroad should themselves be American subjects. In Sweden, children of aliens born in Sweden become Swedish if they are domiciled in the country till the age of twenty-two. Austria, Germany, Denmark, Greece, Norway and Switzerland determine national character by reference to the father's nationality. Russian practice appears to be similar, with the addition that all persons born and bred on Russian soil are entitled to claim Russian nationality whatever their parentage. In Italy, the principle of free choice by the children of aliens prevails; but they are Italian subjects when the father has been domiciled in the country for ten years, unless they elect to the contrary. In France, as Mr. Hall expresses it,<sup>3</sup> 'the law has been so modified by recent enactments<sup>4</sup> that its only apparent principle seems to be supplied by a desire to ascribe French national character to as large a number of persons as possible.' Pursuantly to this object it is provided that every child (including any of foreign parentage) born in France is to be deemed a French

<sup>1</sup> Cf. 7 Anne, c. 5; 4 George II, c. 21; 13 George III, c. 21.

<sup>2</sup> *Commentaries*, vol. i, p. 369; cf. also the judgment delivered by Coleridge, C.J., in *Isaacson v. Durant* (1886), L.R. 17 Q.B.D. 58.

<sup>3</sup> 7th ed. p. 236.

<sup>4</sup> The laws of June 26, 1889, and July 23, 1893.



citizen, unless he has made a declaration of alienage in the year following the attainment of his majority. The children of French parents born abroad are French citizens unless naturalised elsewhere. Illegitimate children, by the law of almost all states, follow the nationality of their mother; but in English law in this case the place of birth is the criterion. The nationality of a married woman is almost universally the nationality of her husband. Most states now provide that the children of aliens born in their territories may retain their nationality by making a declaration of alienage on or after attaining majority, a provision which meets the most serious inconveniences of the territorial theory.

The opinion, however, which bases allegiance upon parentage, especially when combined with the view cited from Blackstone that the individual cannot at will dissolve his national ties, may still give rise to controversy. Although the practice is becoming general for each state to prescribe the conditions under which its own citizens are at liberty to change their nationality, circumstances are still conceivable under which the same person may owe allegiance to more than one state according to the laws of each. The war between this country and the United States in 1812 sprang from the British attempt to impress Englishmen naturalised in the United States. Claims similar in character, though not in extent, were put forward till late in this century, when the English law was changed by the Naturalisation Act of 1870, and it was at last formally recognised that a British subject naturalised abroad ceased to be of British nationality.<sup>1</sup>

Expatria-  
tion.

The conflict was between those who affirm a 'right of expatriation,' and those who maintained with Blackstone the doctrine of indissoluble allegiance: *nemo potest exuere patriam* (no man can divest himself of his nationality). American statesmen have at different times taken different views. On at least one occasion the doctrine of inalienable allegiance has been affirmed by the Supreme Court, but in 1868 an Act of Congress declared that 'the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness.' This resolution is hardly consistent with the most authoritative practice. Many states recognise the claims of the *patria originis* by the refusal to naturalise except where the consent of that country has been given; it is, moreover, the general practice

<sup>1</sup> But a British subject may not become naturalised during a war, in an enemy state: the act of becoming so naturalised is an act of treason (*R. v. Lynch* (1903), 1 K.B. 444).

among European nations to impose conditions on the act of expatriation, a practice not to be reconciled with the existence of the absolute right alleged.<sup>1</sup> Finally a study of recent controversies suggests that expatriation made without permission would not be held in any country to protect a person naturalised elsewhere from the consequence of obligations incurred previously to naturalisation. If these considerations are well founded, each state has the right of determining the conditions under which its citizens shall be at liberty to leave it. Occasions of controversy are not likely to occur in future, unless the person naturalised has failed to comply with these conditions, and in such a case the country of adoption is not entitled to intervene between its new subject and his country of origin.

The naturalisation laws of each state naturally vary in details, and particularly in the length of previous residence required.<sup>2</sup> In a work of this scope it is not possible to give an account of the rules which obtain in foreign systems, but a short statement of the effect of the British Nationality and Status of Aliens Act, 1914<sup>3</sup> (which is a consolidating and amending Act), may usefully be added. Section 1 defines a natural-born British subject, sections 2-9 deal with the naturalisation of aliens, sections 10-12 with the national status of married women and infant children, sections 13-16 with the loss of British nationality, sections 17-18 with the status of aliens, sections 19-24 with procedure and evidence, and sections 25-28 with supplemental matters.

Naturalised  
subjects.

A certificate of naturalisation may be granted to an alien who applies for it, if he has resided in His Majesty's dominions or has served the Crown for five years (subject to certain qualifications), if he is of good character and has an adequate knowledge of English, and he intends to continue his residence or service; the certificate will not take effect unless he takes the oath of allegiance (section 2).

The Governments of British possessions are empowered to grant certificates of Imperial naturalisation (section 8). Self-governing dominions may adopt the provisions relating to the naturalisation of aliens (section 9).

The wife of a British subject is a British subject, the wife of an alien is an alien; but the wife of a British subject who loses his nationality may by making a declaration retain her British nationality (section 10).

<sup>1</sup> Hall, 7th ed. pp. 245 *seq.*

<sup>2</sup> See *Parl. Papers, Misc.* No. 3, 1893.

<sup>3</sup> 4 & 5 Geo. V, c. 17. A further Act has just been passed.

A woman who, having been a British subject, has become an alien by marriage does not cease to be an alien merely because of the death of her husband or the dissolution of her marriage; and a woman who, having been an alien, has become a British subject by marriage does not cease to be a British subject merely because of the death of her husband or the dissolution of her marriage (section 11).

An infant child of a British subject who loses his nationality ceases to be a British subject, unless the child does not thereupon become by the law of another country naturalised therein; 'provided that where a widow who is a British subject marries an alien, any child of hers by her former husband shall not, by reason only of her marriage, cease to be a British subject, whether he is residing outside His Majesty's dominions or not. Any child who has so ceased to be a British subject may, within one year after attaining his majority, make a declaration that he wishes to resume British nationality, and shall thereupon again become a British subject' (section 12).

A British subject loses his nationality by foreign naturalisation (section 13).

'Any person who by reason of his having been born within His Majesty's dominions and allegiance or on board a British ship is a natural-born British subject, but who at his birth or during his minority became under the law of any foreign state a subject also of that state, and is still such a subject, may, if of full age and not under disability, make a declaration of alienage, and on making the declaration shall cease to be a British subject. Any person who though born out of His Majesty's dominions is a natural-born British subject may, if of full age and not under disability, make a declaration of alienage, and on making the declaration shall cease to be a British subject' (section 14).

Naturalised subjects are empowered to divest themselves of their status in certain cases (section 15).

'Where any British subject ceases to be a British subject, he shall not thereby be discharged from any obligation, duty or liability in respect of any act done before he ceased to be a British subject' (section 16).

Aliens domiciled in or passing through the territory.

The legal effects of domicile assume importance in connection with the rules of war. It is sufficient here to notice that the nature of the jurisdiction which may be asserted over persons domiciled in a foreign country by the Government of that country differs only in degree, and not in character, from



that which is exerciseable over aliens passing through the territory.<sup>1</sup> Both alike are *subditi temporarii*, and are subject to taxation and amenable to the criminal jurisdiction for acts committed within its area. They are not liable to military service, except perhaps in defence of the country against uncivilised enemies, or such service as is necessary for the maintenance of social order, and is of the nature of police service. So recently as 1897, an attempt was made by Belgium to compel aliens to serve in the civic guard, but this was abandoned in deference to protests from other powers. On principle this immunity ought not to be affected, in the case of domiciled persons, by an expression of intention to become citizens of the state in which they reside. It seems, however, to have been admitted in the negotiations between this country and the United States in 1863 that resident foreigners who had made known such an intention might be subjected to the obligation of military service as an alternative to leaving the country within a reasonable period. No right to protection, as against the country of allegiance, or indeed as against third powers, can be based upon a residence which falls short of naturalisation; and the American claim in the case of Martin Koszta, that a domiciled foreigner, who had made a statutory declaration of intention to become a citizen of the United States, was entitled to the same protection as a fully naturalised person, was consistent neither with principle nor with authority.<sup>2</sup> The action of the United States was defended by an untenable claim that domicile confers national character; but Westlake suggests that it may be justified on the ground put forward in a dispatch by Mr. Bayard on August 5, 1885. 'The criterion . . . with respect to aliens who have declared but not lawfully perfected their intention to become citizens of the United States, is very simple. When the party after such declaration evidences his intent to perfect the process of naturalisation by continued residence in the United States as required by law, this Government holds that it has a right to remonstrate against any act of the Government of original allegiance whereby the perfection of his American citizenship may be prevented by force, and original jurisdiction over the individual reasserted.'<sup>3</sup> The principle was admitted not to be applicable to the case of a man who having declared his

<sup>1</sup> An alien has no legal right to enter British territory: *Musgrove v. Chun Teeong Toy* (1891), App. Cas. 272. Alien immigration has also been restricted by the Aliens Act, 1905 (5 Ed. VII, c. 13).

<sup>2</sup> This case is fully discussed by E. M. Borchard, *Diplomatic Protection of Citizens Abroad* (1915), §§ 250, 251.

<sup>3</sup> Westlake, Part I, p. 207.



intention of obtaining American nationality, immediately established a commercial domicile in the country of original allegiance.<sup>1</sup>

## 2. EXEMPTIONS FROM THE ABOVE JURISDICTION

Foreign  
sovereigns.

International comity and convenience have given rise to several exemptions from the jurisdictional rights above described. Thus a foreign sovereign and his suite are not amenable to the jurisdiction of a state in the territory of which they may happen to be. As Lord Langdale expressed it in *Duke of Brunswick v. King of Hanover*:<sup>2</sup> 'There are reasons for the immunities of sovereign princes at least as strong if not much stronger than any which have been advanced for the immunities of ambassadors.' So Vattel:<sup>3</sup> 'S'il est venu en voyageur, sa dignité seule, et ce qui est dû à la nation qu'il représente et qu'il gouverne, le met à couvert de toute insulte, lui assure des respects et toute sorte d'égards, et l'exempte de toute juridiction.'<sup>4</sup> This exemption is complete;<sup>5</sup> it covers not only all civil and criminal jurisdiction, but all payment of taxes, and even all police regulations. The only remedy against a foreign sovereign if he breaks the law is to expel him. On the other hand (though opinion on this point is not unanimous<sup>6</sup>), he may not exercise any jurisdiction of his own, even between members of his own suite, in foreign territory; nor can he grant asylum to a person not a member of his suite. If, however, he applies to the local courts, he thereby submits to their jurisdiction and may be met by a counterclaim.<sup>7</sup> If he holds property, he may be subject to the extent of that property to the jurisdiction of the country in which it is situated; and, if he, though a sovereign in one country, is a subject in another, he probably cannot claim exemption from his liabilities in the latter capacity.<sup>8</sup>

Foreign  
forces and  
public  
vessels.

The immunities of diplomatic agents have been already considered,<sup>9</sup> and by way of final exception may be mentioned the privileges conceded by the practice of nations to armed

<sup>1</sup> Westlake, Part I, p. 208.

<sup>2</sup> (1844), 6 Beav. at p. 50.

<sup>3</sup> Lib. iv, c. 7, 8, 108.

<sup>4</sup> Cited in the judgment in *The Parlement Belge* (1878), 5 P.D. at p. 206.

<sup>5</sup> See *De Haber v. The Queen of Portugal* (1851), 20 L.J.Q.B. 488; *Mighell v. Sultan of Johore* (1894), 1 Q.B. 149.

<sup>6</sup> Hall, 7th ed. p. 180n.

<sup>7</sup> *South African Republic v. La Compagnie Franco-Belge, etc.* (1897), 2 Ch. 487; (1898), 1 Ch. 190. Cf. *Statham v. Statham and the Gackwar of Baroda* [1912], P. 92.

<sup>8</sup> Hall, 7th ed. p. 180.

<sup>9</sup> See p. 73, *supra*.

forces and public vessels of foreign powers while within the state territory. Occasions for the concession to the former are naturally rare, but the freedom from jurisdiction has been repeatedly affirmed.<sup>1</sup> In the case of public vessels, practice has varied greatly though the law is now well settled in favour of the immunity.

At the end of the eighteenth century the United States claimed the right to board a foreign war-vessel (British) and remove from it American subjects;<sup>2</sup> and though Great Britain protested in that case, the British view as expressed by Lord Stowell in 1820<sup>3</sup> seems to have been much to the same effect. But opinion was by no means unanimous, and the luminous judgment of Marshall, C.J., in the American case, *The Exchange v. M'Faddon*<sup>4</sup> (1812), had much to do with the consolidation of the doctrine of immunity: '[A public armed ship] constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and dignity. The implied licence therefore under which such vessel enters a friendly port may reasonably be construed, and, it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rights of hospitality. . . . Certainly in practice nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.'<sup>5</sup>

In the case of *The Sitka* (a Russian public vessel captured during the Crimean War, 1855, by a British cruiser and brought into San Francisco with a prize crew on board), the American view had so far hardened that even the doubtful doctrine was confidently asserted that a foreign public ship is part of the territory of her state;<sup>6</sup> and Great Britain has steadily upheld in theory the right of asylum on British warships, while conceding that it ought not to be granted to ordinary criminals.<sup>7</sup> The more important European states appear to insist upon the principle of extritoriality. The immunity, it is to be noted,

<sup>1</sup> The question of immunity of military forces stationed abroad was involved in the Casablanca arbitration case, 1909; see *infra*, p. 169.

<sup>2</sup> Hall, 7th ed. pp. 197, 198.

<sup>3</sup> *Ibid.* p. 199.

<sup>4</sup> 7 Cranch, 116.

<sup>5</sup> 7 Cranch, at p. 144.

<sup>6</sup> *Opinions of Attorneys-General of the U.S.*, vol. vii, p. 122.

<sup>7</sup> Hall, 7th ed. p. 202.

applies to all public vessels, whether ships of war or not;<sup>1</sup> and it does not apply to the officers or crew if they leave the ship.<sup>2</sup>

In the case of private vessels it may be taken as a general principle that no such immunity from the local jurisdiction exists; but it is a common practice for the local courts not to take cognisance of matters happening on board, affecting only the internal discipline of the ship and its crew and not disturbing the peace of the port. But it cannot be said that there is any rule of international law establishing this exception.<sup>3</sup>

Foreign  
private  
vessels.

### 3. JURISDICTION WITHOUT THE TERRITORY

This jurisdiction may be conveniently considered under the following heads:—

- i. Jurisdiction over persons in foreign countries.
- ii. Jurisdiction over public ships wherever situate.
- iii. Jurisdiction over private ships on the high seas.
- iv. Jurisdiction over pirates.

#### 1. *Jurisdiction over Persons in Foreign Countries*

The jurisdiction over subjects resident in Eastern countries has been already described,<sup>4</sup> and depends entirely upon convention. Jurisdiction is also claimed by most states over offences against their municipal laws committed by their subjects in foreign countries. By the English common law and by American law crime was, as it is technically expressed, 'local,' *i.e.* justiciable only where committed,<sup>5</sup> but a long succession of English and American statutes has added to the list of offences committed abroad for which criminals of these countries may be called to account by the courts of their own countries. Treason,<sup>6</sup> murder or manslaughter,<sup>7</sup> and bigamy<sup>8</sup> are the principal offences which have been so dealt with in England.<sup>9</sup> It need hardly be said that the jurisdiction can only be made effective if the offender re-enters the country of his allegiance,

Subjects  
abroad.

<sup>1</sup> Cf. *The Parlement Belge* (1880), L.R. 5 P.D. 197; Westlake, Part I, p. 265.

<sup>2</sup> Westlake, p. 267; Hall, 7th ed. p. 208.

<sup>3</sup> Westlake, pp. 271, 272; Hall, 7th ed. p. 213; Wheaton (ed. Phillipson), pp. 163 *seq.*

<sup>4</sup> See p. 81, *supra*.

<sup>5</sup> See *Macleod v. Attorney-General for New South Wales* (1891), A.C. 455; Cobbett, *Cases*, vol. i, p. 212; *Cutting's Case* (1886), Moore, *Digest*, vol. ii, §§ 200-202; Cobbett, *Cases*, vol. i, p. 220.

<sup>6</sup> 35 Hen. VIII, c. 2.

<sup>7</sup> 24 & 25 Vict. c. 100, s. 9.

<sup>8</sup> 24 & 25 Vict. c. 100, s. 57. Cf. *Earl Russell's Case* (1901), A.C. 446; Cobbett, *Cases*, vol. i, p. 217.

<sup>9</sup> For a full list see Stephen, *Digest of Criminal Procedure*, pp. 3 *seq.*



for no nation can arrest any person upon the territory of another.<sup>1</sup>

Connected with the subject now under discussion is that of extradition, or the recovery for justice of criminals who have fled to a foreign country to escape from the consequences of their crimes. It is impossible to allege, as so many jurists have done, that there exists, apart from treaty, a common law right to demand the extradition of criminals. Had such a right existed, there would have been no occasion for the great number of treaties by which it has been expressly secured,<sup>2</sup> though it may perhaps be admitted, in the words of Westlake, that 'this general adoption of the treaty method does not imply that a state would be held free to make its territory a shelter for fugitives from justice, and thereby a nuisance to its neighbours.'<sup>3</sup> Extradition treaties were known in ancient Egypt, China, Greece and Rome;<sup>4</sup> and in modern times the majority of them date from the second half of the nineteenth century. The earlier treaties, unlike those of the present time, related to the surrender of political offenders rather than of ordinary criminals.

Fugitive  
criminals—  
extradition.

Lord Russell of Killowen<sup>5</sup> based the law of extradition 'upon the broad principle that it is to the interest of civilised communities that crimes, acknowledged to be such, should not go unpunished, and it is part of the comity of nations that one state should afford to another every assistance towards bringing persons guilty of such crimes to justice.' In most countries special legislation is necessary in order that an extradition treaty can be put into effect. As Lord Brougham said in the House of Lords in 1842 when the *Creole* case was under discussion: 'What right existed, under the municipal law of this country, to seize and deliver up criminals taking refuge there? What right had the Government to detain, still less to deliver them up? Whatever right one nation had against another nation—even by treaty which would give the strongest right—there was by the municipal law of the nation no power to execute the obligation of the treaty.'<sup>6</sup>

A full account of extradition practice would far exceed the scope of this work, but the English rules may be briefly stated, English practice.

<sup>1</sup> See p. 87, *supra*.

<sup>2</sup> Heffter, *Das europäische Völkerrecht*, § 63.

<sup>3</sup> Westlake, Part I, p. 253.

<sup>4</sup> Cf. C. Phillimore, *Int. Law and Custom of Ancient Greece and Rome*, vol. i, pp. 358 *seq.*

<sup>5</sup> *In re Arton* (1896), 1 Q.B. at p. 111.

<sup>6</sup> W. Forsyth, *Cases and Opinions in Constitutional Law* (London, 1869), p. 369; cf. Kent, *Commentaries* (ed. 8), §§ 39-42; *Opinions of U.S. Att.-Gen.*, vol. iv, p. 98.



to illustrate the principles involved. The right to deliver up criminals, or recover them, as the case may be, depends municipally upon a number of statutes.<sup>1</sup> Internationally it is secured by some sixty treaties with about forty foreign countries, comprehending almost all the graver offences. The first condition precedent to extradition is a requisition from a diplomatic representative of the state seeking it, made in respect of one of certain specified 'extradition crimes,' to the list of which bribery has recently been added. This requisition is addressed to a Secretary of State, whose duty it is to determine whether the crime in question is of a political nature. Section 3 (1) of the Act of 1870 provides that 'a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on *habeas corpus*, or to the Secretary of State, that the requisition for his surrender has, in fact, been made with a view to try or punish him for an offence of a political character.' The meaning of this qualification was much discussed in *In re Castioni*.<sup>2</sup> Denman, J.,<sup>3</sup> observed: 'The question is whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character, with a political object, and as part of the political movement and rising in which he was taking part.' Hawkins, J.,<sup>4</sup> cited with approval the observations contained in Stephen's *History of the Criminal Law*:<sup>5</sup> 'I think therefore that the expression in the Extradition Act ought to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances.' Stress, however, was laid by the court upon the fact that a crime committed in the course of 'a political disturbance' is not necessarily political in character: and it has also been decided<sup>6</sup> that an anarchist crime is not political, for to constitute that character 'there must be two or more parties in the state, each seeking to impose the government of their own choice on the other.'

The alleged criminal may be arrested either on a warrant issued by a police magistrate on receipt of an order from the Secretary of State, and on such evidence as would justify the

<sup>1</sup> 33 & 34 Vict. c. 52, 36 & 37 Vict. c. 60, 58 & 59 Vict. c. 33, and 6 Ed. VII, c. 15 (which added bribery to the list of extradition crimes).

<sup>2</sup> (1891), 1 Q.B. 149.

<sup>4</sup> *l.c.* p. 165.

<sup>3</sup> *l.c.* at p. 159.

<sup>5</sup> Vol. ii, pp. 70, 71.

<sup>6</sup> *In re Meunier* (1894), 2 Q.B. at p. 419.

issue of a warrant if the crime had been committed in England, or by a police magistrate or justice of the peace on such information or complaint and on such evidence as would justify its issue if the crime had been committed within his jurisdiction: in the latter case a report is at once made to the Secretary of State, who may order the warrant to be cancelled, or may send to the police magistrate before whom the prisoner is brought an order signifying that a requisition has been made for his surrender. If the Secretary of State decides that the offence is political,<sup>1</sup> he may refuse to send any order, or may at any time order the accused to be discharged, or the prisoner may, by proceedings on a writ of *habeas corpus*, obtain his release on that ground. The prisoner is committed to prison to await extradition if there is evidence which would in an English case justify his committal for trial; but he is not to be surrendered for a period of at least fifteen days after committal, and if he is not surrendered within two months, a judge of the High Court has power to order his discharge. It is to be noted, too, that he is not to be surrendered unless provision is made by the law of the state claiming him, or by arrangement, that he shall not be detained or tried for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded, unless in the meanwhile he has been restored or had an opportunity of returning to British territory.<sup>2</sup>

## 2. Jurisdiction over Public Ships

This question has been already dealt with from the point of view of the state into whose territory the public ship of another state comes, and the exemption of such ship from the local jurisdiction involves as its correlative the exclusive sovereignty of the state of its allegiance. By the fiction of 'extritoriality,' public ships are, so to speak, detached fragments of the country to which they belong, carrying with them its privileges and immune from alien jurisdiction. But there is serious doubt as to the value of any such fiction,<sup>3</sup> though it gives a fair idea of the immunities which public ships enjoy,

<sup>1</sup> There is no consensus of opinion as to when an offence is purely or primarily political; a widely prevailing view is that expressed by the Institute of International Law, *Annuaire*, vol. xii, p. 182, Arts. 13-15; trans. by Westlake, *Int. Law*, Part I, pp. 256, 257.

<sup>2</sup> As to the practice of the United States and other countries, see Wheaton (ed. Phillipson), pp. 191 *seq.*

<sup>3</sup> Cf. Hall, 7th ed. p. 261.

and may be safely employed to describe existing facts, if not as a basis for deductive reasoning. If a foreign public ship disturbs the peace of the port which grants it hospitality, it may undoubtedly be required to depart; but it is in itself inviolable. Any interference with it is now generally agreed to be an act of war, and satisfaction for any wrong which it commits must be obtained by diplomatic action against the Government by which it is commissioned or employed.

### 3. *Jurisdiction over Merchant Ships*

Merchant  
ships.

Every state possesses jurisdiction over its merchant vessels and their crews and all persons upon them, whether subjects or not, while upon the high seas, for the reason that there is no other authority possessing a higher claim. Here the facts fall far short of the fiction of extraterritoriality, for the jurisdiction of origin gives way in case of conflict as soon as the vessel arrives within the territorial waters of another state, and for an offence committed by or on board her in territorial waters, she can be pursued into and seized or boarded upon the open seas, if the pursuit began when she was in territorial waters or had only just left them.<sup>1</sup> It was even argued by the United States in the Behring Sea Arbitration (1893) that a state has a jurisdiction for an indefinite distance beyond its territorial waters for purposes of self-protection, a jurisdiction not limited to cases of emergency; but the contention was not supported by precedent and was not accepted as valid.<sup>2</sup> If, however, the local jurisdiction is not asserted, the state to which the vessel belongs may properly exercise its concurrent jurisdiction.

The earliest statutes in this country on the subject of Admiralty jurisdiction are 3 Rich. II, c. 3, and 15 Hen. VIII, c. 15, and the English view was well expressed by Bovill, C.J.:<sup>3</sup> 'When our vessels go into foreign countries, we have the right, even if we are not bound, to make such laws as to prevent disturbances in foreign ports, and it is the right of every nation which sends ships to foreign countries to make such laws and regulations. . . . The place where the vessel was lying was in a navigable river, in a broad part of it below all bridges, and at a point where the tide ebbs and flows, and where great ships lie and hover. What difference is there between such a place and the high seas? The cases clearly show that the Admiralty has jurisdiction in such a place; if so, the case stands precisely

<sup>1</sup> Hall, 7th ed. p. 266.

<sup>2</sup> *Ibid.*

<sup>3</sup> *R. v. Anderson* (1868), L.R. 1 C.C.R. 166.



the same as if the offence had been committed upon the high seas.' In that case the British Court exercised jurisdiction though the offence had been committed in French territorial waters.

#### 4. *Jurisdiction over Pirates*

Pirates are sometimes described as *hostes humani generis*, a description which is, however, not entirely accurate, as the term pirate is applied to those who commit acts of war against one state only, without themselves deriving authority from any state. In this case other states do not as a rule interfere unless directly affected; but, in general, pirates are justiciable, as Sir L. Jenkins puts it, 'being reputed out of the protection of all laws and privileges . . . in what parts soever they are found.'<sup>1</sup> Sir Charles Hedges, Judge of the High Court of Admiralty, in his charge to the grand jury in 1696,<sup>2</sup> gave the following definition of piracy: 'Piracy is only a sea term for robbery, piracy being a robbery within the jurisdiction of the Admiralty. If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself or any of the goods with a felonious intention in any place where the Lord Admiral hath jurisdiction, this is robbery and piracy.' This definition, which has been cited with approval in the Privy Council,<sup>3</sup> was made with particular reference to the law of England, and it must be carefully noticed that the municipal policy of a particular state may treat as piratical acts (*e.g.* the slave trade) which do not bear that complexion by the law of nations. Piracy in international law is commonly defined by writers as the offence of depredating on the seas<sup>4</sup> without being authorised by any sovereign state, or with commissions from different sovereigns at war with each other.<sup>5</sup> But both this definition and that of Sir Charles Hedges are too narrow, in that they imply that an *animus furandi* is essential; whereas the essential characteristic of piracy is that the acts complained of are done without the authority of a sovereign state or a politically organised society, and for private ends, and

<sup>1</sup> *Works*, vol. ii, p. 714.

<sup>2</sup> *R. v. Dawson* (1696), 13 St. Tr. 654.

<sup>3</sup> *Attorney-General for Hong-Kong v. Kwok-a-Sing* (1873), L.R. 5 P.C. 199. Various definitions were examined in *The Republic of Bolivia v. Indemnity Mutual Marine Insur. Co.* [1909], 1 K.B. 785.

<sup>4</sup> Bynkershoek adds 'or land' (*Quæst. Jur. Pub. lib. i, c. xvii*). The extension is reasonable when the acts are performed by persons descending on the land from the sea.

<sup>5</sup> Wheaton (ed. Phillipson), p. 204. Cf. the various authorities that are cited in the American case, *United States v. Smith* (1820), 5 Wheaton, 157.



'robbery' or 'depredation' is not necessarily an ingredient of the offence. As Sir L. Jenkins has it: <sup>1</sup> 'The law distinguishes between a pirate who is a highwayman and sets up for robbing, either having no commission at all or else hath two or three, and a lawful man of war that exceeds his commission.' The definition given above makes it impossible to treat as pirates the bearers of letters of marque. A tendency has been shown from time to time to extend the definition so as to comprehend such persons, but however objectionable the practice of issuing privateer commissions to foreigners was (for privateering has been abolished by the Declaration of Paris, 1856), the bearers were clearly not pirates, insomuch as they had behind them a politically organised and responsible society.

The doctrine above set forth was much discussed in the case of *The Huascar*. In 1877, in the course of a revolution in Peru, the crew of the *Huascar* seized the vessel and committed acts of violence on some British steamers. The Peruvian Government by decree repudiated all responsibility for the acts of the ship. Under these circumstances the British commander in the Pacific, regarding the acts of the *Huascar* as piratical, engaged her in an indecisive encounter. The Peruvian Government then made a demand for satisfaction on the untenable ground that the acts of the *Huascar* did not amount to piracy. Piratical in the vulgar sense they certainly were not, but they were most clearly so within the meaning of international law. So far from there being a responsible, there was not even a belligerent society behind the vessel. She stood completely alone.<sup>2</sup>

<sup>1</sup> *Works*, vol. ii, p. 714; cited Wheaton, *l.c.* p. 205*n*.

<sup>2</sup> *Parl. Papers, Peru*, No. 1, 1877.

## CHAPTER IV

### THE TREATY LAW OF NATIONS

TREATIES form the contract law of states, and it is in dealing with their enforcement and duration that international law most conspicuously fails.<sup>1</sup> In the absence of a supreme authority capable of developing a system of law and enforcing its decrees, all rules are of the nature of suggestions for the guidance of conduct; and while nations are so careful as they are at present to reserve their right of action on questions concerning their 'honour and vital interests' in all general submissions to arbitration, the rules applicable to treaties of the more important kind, which do not merely deal with points of detail, must remain largely in the region of 'pious aspirations.'

Treaties and  
contracts  
compared.

The analogy between contracts between states and contracts between individuals is useful; but if the purpose is to state the law as it is, this analogy must not be pressed too far. At the outset, on the question of consent, there is a marked distinction to be drawn; for whereas municipal law will not hold valid a contract obtained by force, many of the most important treaties of the world are the result of the exercise of force, or the threat of it, upon a nation which has no alternative but surrender. To treat force, therefore, as invalidating a treaty would be to strike at the root of every treaty made at the conclusion of a war; but this, of course, does not apply when the force is exercised on the person of the negotiator of the treaty. To introduce, for example, an armed force into the conference chamber with the object of terrorising a negotiator into submission would obviously invalidate the agreement extorted from him.<sup>2</sup> The kind of duress

<sup>1</sup> Thus Woolsey (5th ed. p. 170), who certainly does not underrate the influence of international law, observes: 'A combination to commit injustice, . . . for example, to conquer and appropriate an independent country, as Poland, is a crime which no formalities of treaty can sanction. This rule, it is true, is not one of much practical application to the concerns of nations, for, beforehand, most of the iniquities of nations are varnished over by some justifying plea, and the only tribunal in the case is the moral indignation of mankind, while after the crime has triumphed, mankind accepts the new order of things rather than have a state of perpetual war.'

<sup>2</sup> Cf. J. C. Bluntschli, *Das moderne Völkerrecht*, § 704.

that nullifies an engagement is thus differentiated by Phillimore from the use of legitimate force that has no such effect: 'The resignation of his crown and kingdom, extorted by Napoleon from Ferdinand VII at Bayonne, whither he had decoyed that monarch and his family, was clearly—the duress and condition of the party abdicating being considered—invalid; but the resignation of Napoleon at Fontainebleau was not extorted by treachery or duress, but was the consequence of defeat in open legitimate war.'<sup>1</sup> A certain amount of fraud, again, may be permissible; a nation need not disclose the weak spots in its own armour. 'Some latitude must be allowed in negotiating treaties of peace to the right of misleading an adversary which is incident to war.'<sup>2</sup> The boundary of permissible deceit will not on all occasions be easy to draw; but the use, for instance, of forged documents will clearly lie outside it.

Further on the question of how long a treaty remains binding the analogy of the municipal law of contracts is, as we shall see, hardly a safe guide; though possibly the claim which states make to disregard a treaty if the circumstances have changed may be supported by reference to those cases in municipal law, such as bankruptcy and the disappearance of the subject-matter of the contract, in which provision is made for the release of the parties otherwise than by mutual consent; and it must always be remembered that in municipal law the breach of a contract is condoned on payment of damages, and that the enforcement of specific performance is an exceptional measure applied only to contracts of a particular kind.

The right to make treaties is an inherent element of national independence, and is perhaps the most decisive test of the existence of sovereignty. Its absence, for instance, from the powers enjoyed by the former Transvaal Republic under the Convention of London of 1884, was of far more importance in determining the international position of that republic than the presence or absence of the word 'suzerainty.' From the point of view of international law it is immaterial where the treaty-making power resides—whether it be in a monarch, or a president of a republic, or a senate, or a representative body, etc., is a question determinable by the constitutional law of the particular contracting state concerned; other nations are entitled only to demand from those with whom they contract a *de facto* capacity to bind the society which they assume to

<sup>1</sup> *Commentaries upon Int. Law*, vol. ii, § 49; referring to T. A. Schmalz, *Das europäische Völkerrecht* (Berlin, 1817), pp. 53, 54.

<sup>2</sup> Westlake, Part I, p. 290.

represent. A treaty entered into by a party who is not invested with the necessary power, or who acts in excess of the power conferred upon him, may be considered null and void. The power may be general, as when it is exercised by the ministry of foreign affairs or some national assembly; or it may be special, as when it is exercised for obviously limited purposes by a military officer, and it will be for the other party to the treaty to see that it contracts with a properly authorised agent.

No very valuable classification of treaties can, from the nature of the case, be given, for such instruments range over the whole variety of international relations.<sup>1</sup> A broad distinction is drawn, however, and will be discussed later, between such as produce their effect once for all, and are then, so to speak, exhausted, *e.g.* a treaty of cession, a boundary treaty; and such as purport to regulate the relations of the parties for a definite or indefinite period, *e.g.* extradition treaties, alliances, commercial treaties, treaties of guarantee. The former are sometimes described as 'transitory,' 'dispositive,' or 'executed' conventions, the latter as executory conventions. Many other classifications have been suggested; *e.g.* real and personal; political and economic (or social); general and special, and so on. But these divisions are neither logical nor useful. It is important, however, to distinguish treaties between two or more states amounting to no more than private arrangements or bargains, from treaties concluded by a considerable number of the leading states of the world for the purpose of adding new provisions to existing international law; the latter class may conveniently be described as law-making treaties, examples of which are the Hague Conventions, the Declaration of Paris, 1856.

Classification  
of treaties.

Treaties of guarantee form an important species requiring special mention. Such treaties are sometimes difficult to construe, especially when the guarantee is jointly made by several powers. Acts in themselves contrary to accepted principles of international law have sometimes been defended as having been done under a treaty of guarantee; but in judging the legal quality of such acts it must never be forgotten that a treaty between A and B can in no circumstances entitle either as against C to do acts which are not otherwise permissible. So far as C is concerned, the treaty is *res inter alios acta*; and in case of war say between A and C, B cannot plead the treaty

Treaties of  
guarantee.

<sup>1</sup> See Hall, 7th ed. p. 371*n*.



Collective  
obligation.

as justifying breaches of neutrality.<sup>1</sup> Treaties of guarantee are of two kinds: collective or joint guarantee; and joint and several (or individual) guarantee. Of a collective guarantee a well-known instance was the treaty by which the great powers in 1867 asserted the perpetual neutrality of Luxemburg. It has been much disputed whether, if the other parties to such a guarantee decline to intervene on occasion, a single signatory is released from his obligations. Lord Derby, in 1867, answered this question affirmatively in a controversy which arose as to the English obligations under the Treaty of Luxemburg: 'In the event of a violation of neutrality all the powers who have signed the treaty may be called upon for collective action. No one of these powers is liable to be called upon to act singly or separately. It is a case, so to speak, of limited liability.'<sup>2</sup> Hall<sup>3</sup> criticises this view on the ground that 'a guarantee is meaningless if it does no more than provide for common action under circumstances in which the guaranteeing powers would act together apart from treaty, or for a right of single action . . . as a matter of policy.' It seems a sufficient answer to the objection that states may normally be expected to abide by their undertakings, and therefore a joint guarantee will ordinarily secure concerted action pursuant to its terms, though the circumstances are no longer such that 'the guaranteeing powers would act together apart from treaty.' On principle Lord Derby's contention is unanswerable. If a state undertakes a duty in concert with others, on what principle is it committed to an isolated performance? It was never pledged to such action, and its unassisted resources may fall far short of the occasion.

Joint and  
several  
obligation.

On the other hand, a guarantee may be joint and several whereby a guaranteeing state would be obliged, if necessary, to act alone if its co-guarantors refused to fulfil their obligations. Examples of such treaties of guarantee are those of 1831 and 1839 which established the permanent neutrality of Belgium, the Convention of Paris, April 15, 1856, between Great Britain, France and Austria, ensuring the independence and integrity of the Ottoman Empire. In 1867 Lord Clarendon thus differentiated the case of Belgium from that of Luxemburg: 'If we had undertaken the same guarantee in the case of Luxemburg as we did in the case of Belgium, we should, in my opinion, have incurred an additional and very serious

<sup>1</sup> Cf. the question of the supply of troops by a neutral to a belligerent, which is dealt with later, p. 294.

<sup>2</sup> Hansard, third ser. clxxxvii, 1922.

<sup>3</sup> 7th ed. p. 356.

responsibility. I look upon our guarantee in the case of Belgium as an individual guarantee, and have always so regarded it; but this is a collective guarantee. No one of the powers, therefore, can be called upon to take single action, even in the improbable case of any difficulty arising.' <sup>1</sup> The view of Lord Clarendon and Lord Derby was affirmed by Sir Edward (now Viscount) Grey in 1914, on the occasion of Germany's violation of the neutrality of Belgium and Luxemburg.<sup>2</sup> Owing to the different obligations imposed by the two kinds of guarantee, the greatest care should be exercised by the negotiators to formulate their agreement in clear, precise and unambiguous terms. The draftsmanship, for example, of the Belgian guarantee is lamentably defective.

No form has been prescribed as essential to the validity of treaties, though, for reasons which need not be set forth, it is the practice to embody them in formal instruments. They are usually signed by plenipotentiaries of the powers interested, but are in no case binding until they have been ratified. The rule was settled in this form as early as the time of Bynkershoek,<sup>3</sup> with the single exception that in his view ratification was unnecessary when the patent of authority contained full and detailed instructions. Later authorities recognise no exception at all to the rule. Form and ratification.

It is less easy to say under what circumstances ratification may properly be refused by the powers represented. Wheaton <sup>4</sup> Refusal to ratify. recognises the following cases:—

- i. Where the representative has exceeded or deviated from his instructions.
- ii. Where events occurring between signature and ratification have made it impossible to fulfil the treaty stipulations.
- iii. Where the parties have been labouring under a mutual error, which error is discovered before ratification.
- iv. Where the circumstances have changed upon which the treaty in terms is made to depend.

The later view seems to be even more indulgent. In many countries the treaty-making body of the state is distinct from

<sup>1</sup> Hansard, third ser. vol. clxxxviii, p. 151.

<sup>2</sup> See *Parl. Papers, Misc.* No. 10 (1915), pp. 105, 235.

<sup>3</sup> *Quæst. Jur. Pub.*, lib. ii, c. vii.

<sup>4</sup> (Ed. Phillipson), pp. 363, 364.

the executive; treaties may often necessitate legislative change in the municipal law of the contracting parties;<sup>1</sup> and in such cases the fullest right of withholding ratification exists. It may be doubted whether the tendency is not drifting towards the recognition of an absolute right of refusing to ratify. The view of Grotius,<sup>2</sup> which has reappeared so often in the pages of his successors, was coloured by the misleading analogy of agency in municipal law. It follows from the immensity of the interests involved, and the infinitely complex personality of the parties, that the negotiations between plenipotentiaries are more nearly akin to the *pourparlers* of a contract than to its formation.

Interpreta-  
tion of  
treaties.

The text-books contain minute rules of construction for the interpretation of ambiguous passages.<sup>3</sup> The value and authority of such statements are inconsiderable. Treaties are to be interpreted like other documents upon broad principles of common-sense, and refined rules of construction are of little importance when no authoritative tribunal can enforce them. The common-sense view was well stated by Erle, C.J., in an English case:<sup>4</sup> 'We are to construe this treaty as we would construe any other instrument public or private. We are to collect from the nature of the subject, from the words, and from the context, the true intent and meaning of the contracting parties whether they are A and B, or happen to be two independent states.'

Commence-  
ment of  
treaty  
obligations.

As soon as ratification of a treaty has taken place, its obligatory effect is carried retrospectively to the time of signature. As Mr. Justice Davis in an American decision<sup>5</sup> expressed it: 'It is undoubtedly true, as a principle of international law, that as respects the rights of either Government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect confirming the treaty from its date.' But it does not follow that this principle is to be so applied as to invalidate private rights which have accrued in the period between the signature and the ratification.

<sup>1</sup> Cf., for instance, Convention XII of the Hague Conference of 1907 relative to the establishment of an International Prize Court.

<sup>2</sup> *De Jur. Bel. ac Pac.*, lib. ii, c. 15.

<sup>3</sup> See Hall, 7th ed. pp. 344 seq.

<sup>4</sup> *Marryat v. Wilson* (1799), 1 Bos. & Pull. at p. 439.

<sup>5</sup> *Haver v. Yaker* (1869), 9 Wallace, at p. 34; cf. *U.S. v. Arredondo* (1832), 6 Peters, 735, and cf. Westlake, *International Law*, Part I, pp. 291, 292.



Private individuals are not bound to assume that the ratifying authority will ratify.

Treaties obviously terminate (as in the case of private contracts) when a fixed time limit expires, or their specified object is accomplished; they may be extinguished by the consent of the contracting parties, or by the non-performance of certain essential conditions. But to determine, apart from these and the like circumstances, the period when treaty obligations cease to bind gives rise to difficulties; and it is somewhat unfortunate that the most authoritative statement on this point cannot be confidently accepted. The following proposition was affirmed by the Declaration of London in 1871:—‘The plenipotentiaries of North Germany, of Austria-Hungary, of Great Britain, of Russia, and of Turkey, assembled to-day<sup>1</sup> in conference, recognise that it is an essential principle of the law of nations that no power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers, by means of an amicable arrangement.’ But at the moment of this declaration the powers concerned were engaged in acquiescing in a flagrant violation of the principle enunciated; for Russia, forbidden by the Treaty of Paris of 1856 to maintain a fleet in the Black Sea, had seized upon the opportunity afforded by the Franco-German war to declare herself released from the restriction so imposed, without consulting any of the other parties to the treaty. It was not politically expedient at the time to resist by force the Russian claim; and the declaration above quoted was an effort to restore the somewhat damaged authority of the general principle of the binding effect of treaties. That it was not a very successful effort was shown by the events of the autumn of 1908. Austria was a party to the Declaration of London. By the Treaty of Berlin of 1878, Bosnia and Herzegovina, while remaining under the suzerainty of the Sultan of Turkey, were placed under Austrian occupation and control. In 1908, Russia was exhausted by her war with Japan and by internal troubles, and Turkey had but recently come through the revolution which deposed Abdul Hamid and placed the Young Turks in a position of somewhat precarious power. Bulgaria having seized the line of the Oriental Railway Company, proclaimed her independence from Turkey on October 5, and Austria, two days later, with only one day’s warning to France and England, converted her occupation of Bosnia and Herzegovina into annexation, on the plea that

Binding  
force and  
termination  
of treaties.

<sup>1</sup> January 17, 1871.



those countries wished for constitutional institutions, and that the grant of such could more conveniently be made if the anomaly of Turkish suzerainty were removed. Turkey was indignant and boycotted Austrian goods. Serbia and Montenegro, fearing absorption in their turn, clamoured for war, while the signatory powers of the Treaty of Berlin insisted upon a Conference, and did their best to restrain the Serbian indignation. In January of the following year (1909), however, Turkey accepted £2,200,000 in compensation. Russia, acting, it is with good reason believed, under the influence of Germany, shortly afterwards recognised the annexation, and Great Britain persuaded Serbia to give way. A Conference was no longer necessary, and the powers agreed to amend the treaty and legalise the action of Austria. That the treaty had been set at naught there can be little question; but as the two provinces were already practically in Austrian hands, the actual change effected was of little moment; and the case, though undoubtedly serious from the point of view of international law, was hardly so serious as the case of Russia and the Black Sea in 1870.<sup>1</sup>

Both in theory and in view of subsequent events, it may be gravely doubted whether a standard so inelastic as that set up by the Declaration of 1871 does not involve an impossible strain on the respect conceded to international law. No temporal limits of any kind are assigned by the declaration to the duration of treaty obligations, and the refusal of one party to release another may in theory perpetuate an obligation which had its origin in wholly different conditions. Wheaton<sup>2</sup> treats the Declaration as elementary, and observes: 'It is melancholy to think that the most civilised powers of the world should have considered it necessary to put forward such a declaration in the year 1871.' This view seems to rest on a confusion between the moral and legal aspects of the case. Carefully observing this distinction we may lay down the following propositions:—

1. No independent Government can indefinitely and for all time bind its successors by treaty, for the community so shackled would no longer be completely independent. It should follow therefore that every state becomes legally entitled to repudiate a treaty

<sup>1</sup> See *Annual Register*, 1908, pp. 309 *seq.*; 1909, pp. 314 *seq.*; Phillipson and Buxton, *The Question of the Bosphorus and the Dardanelles* (1917), pp. 101 *seq.*

<sup>2</sup> (Ed. Phillipson), pp. 110, 111.

of indefinite obligation as soon as the conditions which preceded its formation have undergone substantial modification,<sup>1</sup>—in other words, the condition *rebus sic stantibus* is necessarily implied.<sup>2</sup>

2. If the obligation is temporary and definite, or if the circumstances under which it was made are not materially changed, the breach of it is legally wrongful.

It is difficult, however, to avoid the conclusion that in the present state of opinion, the validity of a treaty depends to an unfortunately large extent upon the power at the moment of the parties to it, and the political importance of the interests which may induce the one party to violate, and the other to insist upon the maintenance of, its terms. The only satisfactory means for securing the observance of treaty obligations, or for exacting reparation for their unjustifiable breach, or for effecting their extinction altogether, is by the judgment of an International Court, which will be so constituted by the nations of the world that its decree may be effectively enforced.

On the question of the effect of war upon treaty obligations it is impossible to lay down any general rule.<sup>3</sup> If it is said that the outbreak of war abrogates or suspends all treaties between the parties, so many obvious and so many possible exceptions at once appear that the rule seems hardly worth enunciating, even as a starting-point for discussion. Clearly those treaties must remain in force which were concluded expressly with a view to war; such as the rules of the Hague Conventions for the regulation of belligerent action, or the convention between Great Britain and France as to postal service in time of war. 'Transitory conventions' too (*i.e.* treaties which produce their consequences once for all, as opposed to treaties which

Effect of  
war upon  
treaty  
obligations.

<sup>1</sup> It is no objection to this view that the other contracting party is entitled to go to war to enforce his treaty right. It is a conspicuous weakness of international law that A may be entitled in law to declare war against B for acts which B is entitled in law to do. For instance, if a given community is forcibly annexed, it is clearly, and at any time, entitled to attempt to reconquer its independence. The power annexing is equally entitled to make good its annexation by force.

The rule in the text may be, as Hall objects, dangerously lax, but it is believed to correspond with the facts of national practice. At least it avoids the *reductio ad absurdum* to which the Declaration of London leads. If that Declaration is well-founded, why are treaties of indefinite duration so often confirmed and renewed?

<sup>2</sup> For an examination of the implied condition, *rebus sic stantibus*, see Phillipson and Buxton, *op. cit.* pp. 113 seq.

<sup>3</sup> See Phillipson, *Termination of War and Treaties of Peace*, pp. 250 seq.

impose continuing obligations) are often described as 'perpetual,' or unaffected by supervening incidents, including war. A belligerent entering a territory ceded in the past to his adversary, clearly enters as a military occupant and not as a sovereign; the United States if at war with Great Britain would not be thrown back to the position of a revolutionary which she occupied before the recognition of her independence in 1783. And it is not only treaties of cession and the like which have this characteristic of permanence. States may make conventions as to the private rights of their respective subjects, as when the United States and Great Britain in 1794 gave to each other's subjects the right to hold and transmit land; where the rights were held not to have been interrupted by war, though the treaty was not expressly revived on the conclusion of peace in 1815. As Leach, M.R., said: 'The relations which had subsisted between Great Britain and the United States, when they formed one empire, led to the introduction of the ninth section of the treaty of 1794, and, the privileges of natives being reciprocally given not only to the actual possessors of lands but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should . . . not depend upon the continuance of a state of peace.' In an American case,<sup>2</sup> a similar judgment was pronounced: 'There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. . . . Treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties or new and repugnant stipulations are made, they revive in their operation at the return of peace.' There are also numerous decisions delivered in continental courts to the same effect.<sup>3</sup>

It may sometimes be a nice question whether a treaty is

<sup>1</sup> *Sutton v. Sutton* (1830), 1 Russ. & Mylne, 675.

<sup>2</sup> *The Society for the Propagation of the Gospel in Foreign Parts v. The Town of New Haven and Wheeler* (1823), 8 Wheaton, 464; Scott, *Cases*, p. 428.

<sup>3</sup> For example, *Featherstonhaugh c. Boffi* (1854), decided by the Cour de Cassation; see R. Jacomet, *La Guerre et les traités* (Paris, 1909), pp. 87 seq., 169 seq.



'transitory' or not; and we may instance the dispute between Great Britain and the United States on the question of the Newfoundland fisheries at the beginning of last century.<sup>1</sup> Great Britain in 1783 had allowed to the inhabitants of the United States the right of fishing in British territorial waters in Newfoundland and Canada. At the peace in 1815 the right was not expressly revived. Great Britain contended that it rested solely on convention, and on convention of a kind which was abrogated by war; the United States not only claimed that it was an integral part of the partition of the territory, but even, apparently, that quite apart from convention, the right belonged to the inhabitants of the United States, because they had previously enjoyed it while British subjects. The American claim was abandoned in the treaty of 1818, and the fishing rights granted by that treaty were recognised to depend upon contract.<sup>2</sup>

Again, treaties affecting the rights of third parties, or to which other powers than the belligerents are parties, cannot be said to be abrogated, or even suspended by war, except in so far as the war causes, for the time being, difficulties or impossibility of performance. In such case the principle seems clear, and it does not matter whether the treaty is of a 'transitory' nature or otherwise. The case of the Russo-Dutch loan, 1854, may be recalled. By a treaty of 1815 between Great Britain, Russia and Holland, Great Britain agreed to pay half of a loan that had been made by Holland to Russia, in consideration of being allowed to retain certain Dutch possessions she acquired during the war. When the Crimean War broke out, a proposal was made in Parliament that Great Britain should repudiate the debt remaining, on the ground that Russia had infringed the arrangements of the Congress of Vienna. But the proposal was rejected as being inconsistent with national honour, and the interest on the debt was paid throughout the war to the agents of the Russian government.<sup>3</sup>

But on the whole question it is impossible to lay down rules of any but the most general kind;<sup>4</sup> for international practice has varied very much. After the Crimean War, fresh

<sup>1</sup> See Wheaton (ed. Phillipson), pp. 369-377; Hall, 7th ed. p. 95; Westlake, *Int. Law*, Part II (1913), p. 33.

<sup>2</sup> The subsequent history of the question will be referred to in the chapter on arbitration, pp. 170 *seq.*

<sup>3</sup> Hansard, *Parl. Debates*, 3rd series, vol. cxxxv, 1096; Cobbett, *Cases*, vol. ii, p. 38.

<sup>4</sup> For an attempted synthesis of such rules, see Phillipson, *Termination of War and Treaties of Peace*, pp. 266-268.



treaties of commerce were concluded. After the Franco-German War, some treaties were revived, some annulled, and others were left unmentioned. After the Russo-Japanese War, no treaties were confirmed or revived at all. After the Turco-Italian War, the Treaty of Lausanne, 1912, renewed all the treaties, conventions and engagements of every kind existing before the war, subject to the subsequent establishment of a commercial treaty on the basis of European public law (*i.e.* leaving Turkey full economic independence and the right to renounce the capitulations concerned). After the Balkan Wars, the Treaty of Constantinople, 1913, between Turkey and Bulgaria, renewed for one year the old commercial and consular conventions, after which they were to be revised; the Treaty of Athens, 1913, between Turkey and Greece, restored in full force all the treaties, conventions, etc., that bound the two countries before the war; moreover both these treaties confirmed the provisions of the Treaty of London, May 30, 1913, which were not abrogated by them.<sup>1</sup>

<sup>1</sup> As to the practice of states after war, see Phillipson, *Termination of War and Treaties of Peace*, pp. 258 *seq.*

## CHAPTER V

### AMICABLE SETTLEMENT OF INTERNATIONAL DIFFERENCES— INTERNATIONAL ARBITRATION

MANY differences between states have in the past been settled in a pacific manner not only by means of negotiations, mediation and good offices, but also by arbitration.<sup>1</sup> The theory and practice of arbitration are as old as international relationships. There are numerous records of the procedure in ancient Greece and Rome.<sup>2</sup> In the middle ages sovereigns and communities submitted disputes to monarchs, jurists, ecclesiastics, and especially to the pope. In the fourteenth and fifteenth centuries the practice became less frequent, and in the seventeenth and eighteenth rare. From time to time various arbitral schemes were propounded by jurists, philosophers and publicists. An important date is 1794 when, under the Anglo-American treaty, various questions were to be referred to arbitrators. After the Napoleonic wars international arbitration made great strides; and peace associations warmly advocated it.

Earlier cases of arbitration.

From about the middle of the nineteenth century states began to conclude general arbitration treaties, for settling differences arising out of commerce, navigation, etc.; and compromise clauses were not infrequently inserted in political conventions and peace treaties.<sup>3</sup> During the century many important cases were thus decided relating not only to commercial matters, but also to the delimitation of boundaries, territorial waters, the rights and obligations of neutrality, the seizure of vessels and cargoes, the nature of contraband goods, the effects of declaration of war, questions relating to slavery, and so on. Some of the more famous of these cases are the Florida Bonds dispute (Great Britain and the United States), the Delagoa Bay case, 1875 (between Great Britain and

<sup>1</sup> On the subject of arbitration the following, among other works, may be consulted by the student: W. E. Darby, *International Tribunals* (London, 1904); J. B. Moore, *History of the International Arbitrations to which the United States has been a Party*, 6 vols. (Washington, 1899); Phillipson, *Studies in International Law* (London, 1908), pp. 1-49; A. de Lapradelle et N. Politis, *Recueil des arbitrages internationaux* (Paris, 1905, etc.).

<sup>2</sup> Cf. Phillipson, *Int. Law and Custom of Ancient Greece and Rome*, vol. ii, chaps. xx, xxi.

<sup>3</sup> See Wheaton (ed. Phillipson), pp. 392, 393.

Portugal), the *Alabama* case, 1872<sup>1</sup> (Great Britain and the United States), the Behring Sea case, 1893, the British-Venezuelan boundary dispute, etc.<sup>2</sup>

The Hague  
Peace  
Conference.

In the summer of 1898 Tsar Nicholas II issued an invitation to the states of the world to send delegates to a Conference for considering the means of checking the growing military and naval armaments and promoting peace. Twenty-six states—twenty European, four Asiatic and two American—accepted the invitation, and were represented at the International Peace Conference which sat at the Hague from May 18 to July 29, 1899. Among the important Conventions established, there was the 'Convention for the pacific settlement of international disputes.'

'As regards myself,' said M. de Staal, in his closing speech as president of the Conference, 'I who have reached the term of my career, and the downward slope of life, consider it as a supreme consolation to have seen the opening of new perspectives for the good of humanity, and to have been able to cast my eyes into the brightness of the future.'<sup>3</sup> M. de Staal spoke with a generous enthusiasm natural in one who had presided with dignity and success over a Congress in which many nations and many conflicting interests were represented. Perhaps the most clear-sighted estimate which appeared of the work of the Conference was that which was made by Mr. Holls, the American representative, in an interview with *The Times* correspondent.<sup>4</sup> Mr. Holls pointed out that any one who was naïve enough to expect disarmament, or the establishment of an international supreme court, with an international police force to enforce its decrees, would undoubtedly be disappointed; and the result of the Second Conference has done nothing to modify this view. He added that the proposed treaty of arbitration was the best attainable result in the present state of public opinion all over the world. 'The formulating of the ideas of mediation and good offices, of arbitration, of international commissions of inquiry, and of procedure before courts of arbitration, is in itself a work of no small importance. . . . It will not prevent war where the question at issue is of such grave importance that the Government can, with the full approval of public opinion, disregard all the machinery which we have provided for its peaceful adjustment.'

Proposal for  
limitation of  
armaments. A proposal for the limitation of armaments appeared in the forefront of the programme of the Conference of 1899,

<sup>1</sup> See *supra*, p. 49.

<sup>2</sup> Wheaton (ed. Phillipson), pp. 393, 394. See also *supra*, pp. 95, 104.

<sup>3</sup> See *The Times*, Aug. 1, 1899.

<sup>4</sup> Aug. 1, p. 8.

but in the final act of this Conference it had sunk to a resolution that the restriction of military charges was extremely desirable, and to a 'wish'<sup>1</sup> that the Governments, taking into consideration the proposals made at the Conference, might examine the possibility of an agreement as to the limitation of armed forces by land and sea, and of war budgets. From the programme of 1907 (when forty-four states were represented), the subject had disappeared entirely, though the British Government was anxious that it should, at the least, be discussed;<sup>2</sup> but the Conference reaffirmed with emphasis the resolution of 1899, and in the course of its deliberations the British Government offered to communicate its naval programme as a basis for discussion each year to any power which would return the compliment—a proposition which was approved by the United States, France, Spain and Russia, but has not as yet led to any practical result.<sup>3</sup> The difficulties of the problem have proved insuperable; and it may be conjectured with some confidence that whatever positive influence for good the Conferences may gain will be exercised in the manner indicated by Mr. Holls. Their highest utility will be found in the work of familiarising men's minds with the idea of arbitration in international matters, and with the imperative quality of the laws of war. As to the former, the value of the existence of a tribunal of inquiry was clearly demonstrated during the North Sea crisis of 1904. As to the latter, soldiers and jurists are alike agreed that the influence of the laws of war has infinitely relieved the horrors of the operations of war, without impairing the efficiency of those operations for crushing the armed resistance of the enemy; and their reassertion upon the authority of a great international council, formally representative of the armed forces of the world, marks an occasion of the highest significance. The agitation provoked by the use of expanding bullets in the Boer War illustrates the reality of what the Duc de Broglie called the moral effect of the Conference. The Dutch Republics were not represented at it, and the English representative did not sign the declaration proscribing the use of dum-dum bullets. It was, nevertheless, assumed by both belligerents that the employment of such bullets was an offence against international usage.

The Peace Conferences—to attempt a general summary of their results—disappointed the excessive hopefulness of those who foresaw in their convocation the beginning of—

General results of Peace Conferences.

'The Parliament of Man, the Federation of the World.'

<sup>1</sup> *Vœu* 4 of 1899.

<sup>2</sup> *Parl. Papers, Misc. No. 1* (1908), p. 12.

<sup>3</sup> *Ibid.*



and repeated the quotation till it began to nauseate; but they rose far above 'the cheap wit and shallow philosophy' of those who predicted an unrelieved failure. The mere assembly of such Congresses, the harmonious progress of their deliberations and the weighty reserve of their pronouncements, marked the advent of a stage in international history which was calculated to reduce the occasions of war, and to mitigate the horror of unpreventable struggles.

Limits of  
arbitration.

The chief practical achievement of these Conferences has undoubtedly been the establishment of a permanent machinery for dealing with international disputes. Such an institution was the logical and natural outcome of a tendency which had been gathering force for over a century to resort to arbitration as an alternative to war. That any arbitration has its limitations when the court has no power to enforce its award is obvious. It rests with the losing party to decide whether it will accept the award or not; and though it may be laid down that a decision may be disregarded 'when the tribunal has clearly exceeded the powers given to it by the instrument of submission, when it is guilty of an open denial of justice, when its award is proved to have been obtained by fraud or corruption, and when the terms of the award are equivocal,'<sup>1</sup> the cases will be rare indeed in which the right to disobey will be clear beyond dispute. But behind the award there is always the sanctity (for what it may be worth) of an international treaty; and international public opinion will always have a restraining effect, and can seldom be entirely disregarded. Losing parties have, on the whole, honourably observed their obligations in the numerous arbitrations which have taken place during the past century; the action of the United States in 1831<sup>2</sup> providing the only notable instance of a refusal to accept an award, while the settlement of the *Alabama* matter, of the Venezuelan boundary question, of the North Sea incident and of the Newfoundland Fisheries dispute, give reason to hope that the sphere of arbitration need not be confined to cases 'where the matter at stake is unimportant and the questions involved are rather pure questions of fact than of law or mixed fact and law.'<sup>3</sup> Any objections which may be raised against the *Alabama* award cannot be laid at the door of the principle of arbitration; the fault there rested not with the arbitration, but with the Treaty of Washington, which laid down the law by which the arbitrators were bound.<sup>4</sup>

<sup>1</sup> Hall, 7th ed. p. 374.

<sup>2</sup> *Ibid.* p. 375.

<sup>3</sup> *Ibid.* p. 379n.

<sup>4</sup> See p. 47, *supra*, and p. 303, *infra*.

Before dealing with the general provisions of the Hague Conventions on arbitration, it is necessary to refer to one particular point in which an attempt was made to reduce the possibility of war. In 1902 Great Britain, Germany and Italy having claims on behalf of their subjects against Venezuela on bonds and contracts, and for damages for injury, called upon that country to submit to arbitration, and receiving no satisfactory reply, seized the Venezuelan fleet and bombarded and blockaded several ports.<sup>1</sup> Dr. Drago, the Foreign Minister of the Argentine Republic, thereupon enunciated the doctrine which is associated with his name, 'that a public debt cannot give rise to the right of intervention and much less to the occupation of the soil of any American nation by any European power.' He prayed in aid the Monroe Doctrine;<sup>2</sup> but the United States did not respond wholeheartedly to the appeal. President Roosevelt in his presidential address in 1905, deprecated the enforcement of contractual debts by arms, and stated that it was contrary to the policy of the United States, but would not bind that country to do more than endeavour to bring about an arrangement when other countries were attempting to collect a just debt from an American State. The practice had in the past been uncertain; and Lord Palmerston, in 1848,<sup>3</sup> dealing with claims by British subjects who were holders of public bonds of foreign states, had claimed that it was clearly the right of any Government 'to take up, as a matter of diplomatic negotiation, any well-founded complaint which any of its subjects may prefer against the Government of another country,' and that it was entirely a matter of discretion whether such action should be taken or not, and whether it should be followed by the employment of force. The Drago doctrine specifically referred to 'public debts,' as distinct from ordinary contract debts; inability to obtain payment of the latter through the courts of the debtor's country being presumably due to a defect in the administration of justice, for which the Government of that country is responsible. The non-payment of a public debt, it was in effect urged, stands in a different category. The Government is, of course, responsible, but such non-payment, being seriously against the interest of the debtor country, implies and brings with it such financial and political disturbance, that a small debtor nation ought not to be left at the mercy of

Recovery of  
contract  
debts by  
force.

<sup>1</sup> Pearce Higgins, *The Hague Peace Conferences*, pp. 184 seq.

<sup>2</sup> See p. 93, *supra*.

<sup>3</sup> Hall, p. 290n.

intervention and occupation at such a time.<sup>1</sup> It was also pointed out that the creditor lends the money knowing, and on terms which take account of, the risks. The reasons, however, for the distinction seem inconclusive.

At the Conference in 1907 there was a general willingness to come to some arrangement on the subject, as well in the interest of the creditor as in that of the debtor; for the cost of the forcible collection of a debt is often extravagantly out of proportion to the amount at stake. The Convention finally took the following form:—

‘The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals (*nationaux*). This undertaking is, however, not applicable when the debtor state refuses or neglects to reply to an offer of arbitration or, after accepting the offer, renders the settlement of the *compromis*<sup>2</sup> impossible, or, after the arbitration, fails to comply with the award.’<sup>3</sup>

The above-mentioned distinction between public loans and contract debts does not appear in this, though insisted upon in a reservation made by the Argentine Republic;<sup>4</sup> and a proposal (made by Chile<sup>5</sup>) to include claims for damages for tort was not accepted. Certain states desired an insistence upon the creditor’s first exhausting the legal remedies available in the debtor country;<sup>6</sup> and Venezuela, whose position had raised the whole question, together with Nicaragua, Colombia, Uruguay and Ecuador, demanded that no recourse to force should be allowed at all in the case of differences arising from pecuniary claims.<sup>7</sup> In fact, the general result was, that the states for whose benefit the Convention was presumably drafted either abstained from voting, or put in reservations which entirely altered its character; but it may be taken that all the greater powers will consider themselves bound by it, as there is not the provision, usual in these conventions, that it is only applicable as between the signatory parties, and when occasion arises, there is little doubt that any small power will, when pressed for payment of a debt, hasten to claim it as authoritative.

The Convention (No. II of 1907) was ratified by Great Britain in November, 1909.

<sup>1</sup> Pearce Higgins, p. 187.

<sup>2</sup> Art. I of Convention II of 1907.

<sup>3</sup> *Ibid.* p. 425.

<sup>4</sup> See p. 162, *infra*.

<sup>5</sup> *Parl. Papers, Misc.* No. 4 (1908), p. 424.

<sup>6</sup> *Ibid.* pp. 424-7.

<sup>7</sup> *Id.* pp. 426-7.



At the Conference in 1899 there was drawn up the Convention for the Pacific Settlement of International Disputes, which was in 1907 enlarged and amended, chiefly in respect of certain matters of procedure on which experience had shown amendment to be necessary.<sup>1</sup> Pacific settlement of international disputes.

The Convention begins with an undertaking by the parties to use their best efforts to ensure the pacific settlement of international differences<sup>2</sup> and to have recourse when possible to the good offices or mediation of friendly powers;<sup>3</sup> while the offer of such mediation is declared expedient and desirable, and not to be regarded as an unfriendly act.<sup>4</sup> A few necessarily vague Articles define the duties of the mediator and make clear the purely advisory character of his position;<sup>5</sup> and a special form of mediation<sup>6</sup> is recommended, by which the states at variance are to choose each a second state, and the states so chosen are, for the space of not more than thirty days, to endeavour to settle the dispute, while the states at variance stand aside and cease from all direct communication with each other.<sup>7</sup> Mediation.

After these preliminaries, provision is made for International Commissions of Inquiry. 'In disputes of an international nature, involving neither honour nor vital interests, and arising from a difference of opinion on points of fact, the contracting powers deem it expedient and desirable that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an International Commission of Inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation.'<sup>8</sup> Such Commissions are to be constituted by special agreement between the parties defining the facts to be examined, the formation and powers of the Commission, its place of meeting, the language to be used and any other conditions agreed upon; the place of sitting to be the Hague if not otherwise fixed.<sup>9</sup> Commissions of inquiry.  
A number of detailed provisions, based largely on the experi-

<sup>1</sup> Convention I of 1899 and 1907.

<sup>2</sup> Art. 1 (the references throughout are to the 1907 Convention).

<sup>3</sup> For various instances of mediation before the Hague Conference, see Wheaton (ed. Phillipson), pp. 390, 391. On mediation and good offices generally, see Sir E. Satow, *Diplomatic Practice*, vol. ii, pp. 289 seq.

<sup>4</sup> Arts. 2, 3.

<sup>5</sup> Arts. 4-7.

<sup>6</sup> This is due to the suggestion of one of the American delegates, Mr. F. W. Holls; see his work *The Peace Conference at the Hague* (New York, 1900), pp. 187 seq.

<sup>7</sup> Art. 8.

<sup>8</sup> Art. 9.

<sup>9</sup> Arts. 10, 11.



ence gained at the North Sea Inquiry, were recommended<sup>1</sup> as to the appointment of commissioners, agents, counsel and secretariat, the pleadings and procedure, the calling of witnesses and the taking of evidence upon commission; the continental rule that witnesses are to be examined by the president and not by counsel for the parties being adopted, a suggestion in favour of the English system not being pressed.<sup>2</sup> Speeches by counsel, though not forbidden, are not regarded as necessary. The proceedings are to be private, unless the Commission, with the consent of the parties, decides otherwise; this being thought preferable to a provision that the proceedings are public, with power to hear *in camera*.<sup>3</sup> The decision is by a majority of votes; and it is specifically explained that the report being limited to a finding of fact, has in no way the character of an arbitral award, but leaves the parties entire freedom as to the effect to be given to the finding.<sup>4</sup>

In settling the terms of these Articles, great caution was shown to use no words suggesting compulsion. It was, for instance, only 'deemed expedient and desirable,' not 'agreed,' that Commissions of Inquiry be instituted,<sup>5</sup> and the Russian delegate, while suggesting the alteration, was emphatic in his recognition of the permissive character of the convention. Similarly a Russian amendment, which would have provided that after the decision of the Commission 'the powers at variance are free to conclude a friendly arrangement, or to have recourse to the Permanent Court of Arbitration,'<sup>6</sup> and, by implication, would have forbidden war once the parties had gone before the Commission, was rejected, as being likely to restrict seriously the recourse to such Commissions.

There is, of course, nothing to prevent two powers from adopting different rules from those proposed, or from extending the area of the inquiry or the powers of the Commission.<sup>7</sup> In the one case in which such a Commission has proved its value, the matter in issue, the firing upon the British fishing fleet by Russian war ships in the North Sea in October 1904, was distinctly a dispute involving 'honour and vital interests'; and it was referred to the commissioners to determine where the responsibility lay, and the degree of blame affecting the

<sup>1</sup> Care was taken to leave everything permissive, *Parl. Papers, Misc. No. 4* (1908), p. 309.

<sup>2</sup> *Ibid.* pp. 313-14.

<sup>3</sup> *Id.* p. 314.

<sup>4</sup> Arts. 12-36.

<sup>5</sup> See *Parl. Papers, Misc. No. 4* (1908), p. 305. Russia and Holland desired the word 'agreed.'

<sup>6</sup> See *Parl. Papers, Misc. No. 4* (1908), p. 315.

<sup>7</sup> *Id.* p. 305.

nationals of Great Britain and Russia, or of other countries, in case their responsibility should be ascertained by the inquiry; the 'other countries' referring, of course, to Japan, who was alleged by Russia to have concealed torpedo-boats in the fishing fleet.<sup>1</sup> An attempt was made by Russia in 1907 to include in the Convention a power to decide upon responsibility, in addition to mere questions of fact;<sup>2</sup> but it was thought wiser to leave this to the disputant powers, and not to do anything to obliterate the clear distinction between the functions of the Commission of Inquiry and of a Court of Arbitration.

'International arbitration has for its object the settlement of disputes between states by judges of their own choice and on the basis of respect for law. Recourse to arbitration implies an engagement to submit in good faith to the award.'<sup>3</sup> The general principles being thus stated, the Conference in 1907 discussed at great length the possibility of making arbitration, in some cases at any rate, obligatory.<sup>4</sup> Arbitration.

The principle of compulsory arbitration met with a universal and warm approval; a large majority of the states represented were prepared to agree upon a list of subjects of what were vaguely described as 'a juridical order,' or disputes as to the interpretation of treaties, with the reservation, as a rule, of 'vital interests' or 'national honour'; but a strong minority led by Germany and Austria objected to anything in the nature of a universal treaty of compulsory arbitration, and preferred to reserve each case to be dealt with by a separate treaty as it arose. It was urged that a list was unnecessary, for almost all the items in the various lists proposed were of such a nature as to be extremely unlikely to lead in any event to war; and there was a marked reluctance to surrender in advance, and without consideration of the particular circumstances of each case, that independence which is one of the chief attributes of sovereignty. There being no chance of unanimity, the Conference fell back upon a restatement of the position which had been reached in 1899:<sup>5</sup> 'In questions of a juridical nature, and especially in the interpretation or application of International Conventions, arbitration is recognised by the contracting powers as the most Compulsory arbitration.

<sup>1</sup> Pearce Higgins, pp. 167-8; and see p. 168, *infra*.

<sup>2</sup> *Parl. Papers, Misc.* No. 4 (1908), p. 305.

<sup>3</sup> Art. 37.

<sup>4</sup> *Parl. Papers, Misc.* No. 4 (1908), pp. 351-423.

<sup>5</sup> Art. 16 of Convention I of 1899; and Art. 38 of Convention I of 1907.

effective and, at the same time, as the most equitable means of settling disputes which have not been settled by diplomatic methods.' To this was added: 'Consequently, it would be desirable that, in disputes on the above-mentioned questions, the contracting powers should, in that case, have recourse to arbitration, in so far as the circumstances permit'; and compulsory arbitration was only referred to in an Article <sup>1</sup> in which the powers reserved 'the right of concluding new agreements, general or particular, with a view to extending compulsory arbitration to all cases which they may consider possible to submit to it.'

Permanent  
Court of  
Arbitration.

The rules of 1899, which established a Permanent Court of Arbitration, were in 1907 reaffirmed, amended and extended. The powers undertook to maintain the court, accessible at all times, and competent for all arbitrations,<sup>2</sup> at the Hague.<sup>3</sup> Provision was made for an international registry attached to the court, which keeps all documents and records,<sup>4</sup> and the staff of which is at the disposal of the powers for the use of any special board of arbitration.<sup>5</sup> Each power selects four jurists as members of the court, who serve for six years, with power to be reappointed.<sup>6</sup> When an arbitration has been decided upon, the tribunal is chosen from this list by agreement, and may consist of one arbitrator or more,<sup>7</sup> and in default of agreement, each party appoints two arbitrators (of whom only one may be its national, or chosen from among the persons appointed by it as members of the court), who choose an umpire; and in case of disagreement as to the choice of the umpire, he is, if certain other methods prescribed have failed, to be chosen by lot.<sup>8</sup> Diplomatic privileges and immunities are extended to the members of the tribunal in the performance of their duties.<sup>9</sup> The International Bureau is placed under the control of the Permanent Administrative Council, composed of the diplomatic representatives of the powers at the Hague and the Netherlands Minister for Foreign Affairs, who settle all rules and questions of procedure and administration.<sup>10</sup> Subject to any agreement to the contrary between the parties,<sup>11</sup> the proceedings begin with a *compromis*, a document defining the subject of the dispute, the time allowed for appointing arbitrators, the form or order, and time for delivery of, pleadings, the amount to be deposited in advance to defray expenses, and all other matters,

<sup>1</sup> Art. 19 of Convention I of 1899; and Art. 40 of Convention I of 1907.

<sup>2</sup> Arts. 41, 42.      <sup>3</sup> Art. 43.      <sup>4</sup> Art. 43.      <sup>5</sup> Art. 47.      <sup>6</sup> Art. 44.

<sup>7</sup> Art. 55.      <sup>8</sup> Art. 45.      <sup>9</sup> Art. 46.      <sup>10</sup> Art. 49.      <sup>11</sup> Art. 57.



such as the language to be used;<sup>1</sup> and this *compromis* may be settled by the court if the parties agree to that course. It may also be settled by the court on the application of one of the parties, when all attempts to come to an agreement by the methods of diplomacy have failed; but only in the case of: ' (1) A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has come into force, and providing for a *compromis* in all disputes, and not either explicitly or implicitly excluding the settlement of the *compromis* from the competence of the court. Recourse cannot, however, be had to the court if the other party declares that, in its opinion, the dispute does not belong to the category of disputes which can be submitted to compulsory arbitration, unless the Treaty of Arbitration confers upon the Arbitration Tribunal the power of deciding this preliminary question; (2) A dispute arising from contract debts, claimed from one power by another power as due to its subjects or citizens, and for the settlement of which the offer of arbitration has been accepted. This provision is not applicable if the acceptance is subject to the condition that the *compromis* shall be settled in some other way.'<sup>2</sup> The tribunal for the purpose of settling the *compromis* in such a case is to be chosen as the arbitration tribunal is chosen in default of agreement.<sup>3</sup> When a Sovereign or Chief of a state is chosen as arbitrator, the procedure is settled by him.<sup>4</sup> The question of the language to be used, if not settled by the *compromis*, is to be settled by the tribunal.<sup>5</sup> The tribunal determines its own competence by interpreting the *compromis*, and the other documents which may be adduced.<sup>6</sup> The parties are entitled to employ special agents and counsel, but a member of the Permanent Court may not act as such except on behalf of the power which has appointed him a member<sup>7</sup>—a compromise between unrestricted freedom on the part of members to practise before the court, and total prohibition, which was arrived at in consideration of a dispute that arose on the subject during the Venezuela arbitration in 1904.<sup>8</sup> Provision is made for pleadings and oral arguments; and the time fixed by the *compromis* for delivery of pleadings may be extended by agreement, or by order of the tribunal when justice so requires.<sup>9</sup> The hearing is not public, unless it be so decided by the tribunal, with the assent of the parties.<sup>10</sup> Certain directions are laid

<sup>1</sup> Art. 52.

<sup>2</sup> Art. 53.

<sup>3</sup> Art. 54.

<sup>4</sup> Art. 56.

<sup>5</sup> Art. 61.

<sup>6</sup> Art. 73; and see Pearce Higgins, p. 176.

<sup>7</sup> Art. 62.

<sup>8</sup> Pearce Higgins, p. 175.

<sup>9</sup> Art. 63.

<sup>10</sup> Art. 66.



down for the conduct of the hearing, as to the admission of fresh documents,<sup>1</sup> the power of the court to call for documents<sup>2</sup> and explanations,<sup>3</sup> the power of agents and counsel to raise objections and points, on which the decisions of the tribunal are final, and cannot form the subject of subsequent discussion;<sup>4</sup> and it was found desirable to enact that questions and remarks made by the tribunal during argument are not binding on the tribunal or on any member thereof.<sup>5</sup> The tribunal prescribes the conduct of the case;<sup>6</sup> and for the service of all notices by the tribunal in the territory of a third contracting power, and in the case of all steps taken in order to procure evidence, the tribunal must apply direct to the Government of that power, and requests for this purpose are to be complied with, so far as the means which the power applied to possesses under its own laws allow, and they cannot be rejected unless the power in question considers them likely to impair its sovereign rights or safety.<sup>7</sup> The tribunal deliberates in secret, and its deliberations remain secret, all questions being decided by a majority.<sup>8</sup> The award states the reasons on which it is based; but is only signed by the President and the Registrar or Secretary, and no dissenting judgments are given;<sup>9</sup> this being an important amendment of the corresponding Article of 1899 (Art. 52), which provided for records of dissent and signature by each member. Disputes as to the interpretation or execution of the award are, in default of agreement to the contrary, to be referred to the same tribunal.<sup>10</sup> The *compromis* may reserve a right to demand a revision of the award, and in default of agreement to the contrary, the request for revision must be addressed to the same tribunal. Revision can only take place 'on the ground of the discovery of some new fact which is calculated to exercise a decisive influence upon the award, and which, at the time when the discussion was closed, was unknown to the tribunal, and to the party demanding revision.'<sup>11</sup> When there is a question as to the interpretation of a Convention of which other powers are signatories, such other powers must be notified, and are entitled to intervene; and the award is only binding on the parties to the proceedings, including such other powers as do in fact intervene.<sup>12</sup> Each party pays its own expenses, and an equal share of the expenses of the tribunal.<sup>13</sup>

<sup>1</sup> Arts. 67, 68.<sup>2</sup> Art. 69.<sup>3</sup> Arts. 69, 72, 75.<sup>4</sup> Art. 71.<sup>5</sup> Art. 72.<sup>6</sup> Art. 74.<sup>7</sup> Art. 76.<sup>8</sup> Art. 78.<sup>9</sup> Art. 79.<sup>10</sup> Art. 82.<sup>11</sup> Art. 83.<sup>12</sup> Art. 84.<sup>13</sup> Art. 85.

It was also recognised by the contracting powers as a duty, if a serious dispute threatens to break out between two or more of them, to remind the disputants that the Permanent Court is open to them, such reminder to be regarded as in the nature of good offices; and it was provided that in case of dispute one of the disputants may always address to the International Bureau a declaration that it would be ready to submit the dispute to arbitration.<sup>1</sup>

There was further added in 1907 a series of articles<sup>2</sup> providing a summary procedure (additional to the procedure set out above) for the settlement of disputes in cases of a technical nature in which the parties desire not to be restricted to choosing arbitrators from the members of the Permanent Court; the proceedings being conducted entirely in writing, unless the parties ask that witnesses and experts be called, or the tribunal requires oral explanations. Summary procedure.

In addition to adopting the above rules, the Conference of 1907 recorded the following *vœu*:<sup>3</sup> 'The Conference recommends the signatory powers to adopt the annexed draft Convention for the creation of a Judicial Arbitration Court, and to bring it into force as soon as an agreement shall have been reached respecting the selection of the judges and the constitution of the court.' Proposed Judicial Arbitration Court.

The draft Convention referred to provided for the constitution (without derogation from the Permanent Court of Arbitration) of a court of judges, representing the various juridical systems of the world<sup>4</sup> and chosen if possible from the members of the permanent court. The appointments were to be for twelve years;<sup>5</sup> and the court was to elect annually by ballot three judges to form a special delegation, and three more to replace them if they were unable to act.<sup>6</sup> To secure impartiality, an oath was to be required,<sup>7</sup> and it was provided that no judge should act judicially in any case in which he had taken part in the decision of a National Tribunal, of a Tribunal of Arbitration, or of a Commission of Inquiry, or had figured as counsel or advocate for one of the parties; and it was further provided that a judge cannot act as agent or advocate before the Judicial Arbitration Court or the Permanent Court of Arbitration, or a Special Arbitration

<sup>1</sup> Art. 48.

<sup>2</sup> Arts. 86 to 90.

<sup>3</sup> Final Act of 1907, *Vœu* I (*Misc.* No. 6 (1908), Cd. 4175, p. 15).

<sup>4</sup> *Misc.* No. 6 (1908), p. 128, Art. 1.

<sup>5</sup> Art. 3.

<sup>6</sup> Art. 6.

<sup>7</sup> Art. 5.

Tribunal or a Commission of Inquiry, nor act therein for one of the parties in any capacity whatsoever, so long as his appointment lasts.<sup>1</sup> Each judge was to receive a salary of 6000 Netherlands florins (about £500) per annum, with an allowance of 100 florins a day while sitting;<sup>2</sup> and the court was to sit once a year and then dispose of all the cases on the agenda.<sup>3</sup> The delegation was, with the assent of the parties, to be empowered to decide arbitrations in accordance with the summary procedure provided for by Articles 86-97 of Convention I, or to hold an inquiry after the nature of the Commissions of Inquiry provided for by the same Convention; the judges who had acted on the Inquiry not being thereby debarred from acting as judges, if the case was subsequently submitted to the arbitration of the court or the delegation.<sup>4</sup> Power was given to the delegation to settle the *compromis* with the consent of the parties and, in certain cases, on the application of one party.<sup>5</sup> The procedure was in general to be that laid down in Convention I;<sup>6</sup> and the court was only to be open to the contracting powers,<sup>7</sup> who were to bear the general expenses, the costs of the trial being borne by the disputants.

But in this draft Convention no provision was made for the actual constitution of the court, and it was by reason of the differences of opinion on this point that the Conference failed to arrive at any decision more conclusive than the 'wish' set out above. The object of this special court was explained in the Report to the Conference by the Commission by which the question was discussed.<sup>8</sup> It was of the essence of the Permanent Court set up by Convention I, that on each particular occasion the judges were arbitrators chosen, it is true, from a limited number, but chosen by the parties; and much stress was laid upon the importance to a nation of keeping control over the appointment of the persons by whose decision it was to be bound. But it was hoped that in relation to questions of a purely legal or 'juridical' nature, states might be willing to submit their differences to a court of judges more properly to be described as 'permanent,' appointed without reference to any particular dispute, sitting at regular periods, and prepared to apply to the cases brought before them something like a consistent body of law.

<sup>1</sup> Art. 7.<sup>2</sup> Art. 9.<sup>3</sup> Art. 14.<sup>4</sup> Art. 18.<sup>5</sup> Art. 19.<sup>6</sup> Art. 22.<sup>7</sup> Art. 21.

<sup>8</sup> *Misc. No. 4* (1908), Cd. 4081, pp. 257 *seq.*; and see Pearce Higgins, p. 509.



The Permanent Court was not in fact permanent, for it had to be constituted for each occasion, and lacked the important element of continuity. It was also expensive, and between 1899 and 1907 it had heard only four cases. America put forward a scheme which in its rough outlines was substantially the same as that ultimately adopted in the draft Convention;<sup>1</sup> and it was of the essence of this scheme that recourse to the new court should be purely permissive. The court was also to have an appellate jurisdiction to hear appeals from other tribunals, and particularly to examine the conclusions of Commissions of Inquiry and special arbitration tribunals. Russia suggested a small permanent committee, chosen from a larger panel of judges;<sup>2</sup> Germany approved heartily of the general principle, as did Great Britain and other and smaller states; but some of these latter at an early period made reservations as to the constitution of the court. The American proposal was subsequently withdrawn, and in its place was substituted a scheme drawn up by Germany, America and Great Britain which, after a few modifications, became the draft Convention summarised above. But the insistence of the smaller states upon the absolute equality in all respects of all nations, and the refusal of the larger to admit this claim, made agreement impossible.<sup>3</sup>

It will be useful to add a short summary of the cases which have been dealt with by the tribunals thus set up in 1899.

The first case was that of 'The Pious Fund of the Californias,'<sup>4</sup> in which the Permanent Court, in 1902, decided in favour of the United States against Mexico, in a dispute concerning the interest of part of an old Roman Catholic charitable fund. The fund was originally given in trust for the benefit of the Californias, and was administered by Mexico. In 1848, part of the territory in question was ceded by Mexico to the United States; and the Roman Catholic Church in the ceded portion claimed its share of the proceeds of the fund. In 1878 an award had been made, on a reference to the British Minister at Washington as umpire, in favour of the claimants, and the amount was paid up to the year 1868;

Cases decided under the Convention.  
The Pious Fund of the Californias.

<sup>1</sup> *Misc. No. 4* (1908), p. 260.

<sup>2</sup> *Ibid.* p. 261.

<sup>3</sup> See *Parl. Papers, Misc. No. 4* (1908), Cd. 4081, p. 60; and Pearce Higgins, pp. 514-517.

<sup>4</sup> *British and Foreign State Papers*, vol. xcv (1901-2); Moore, *Int. Arbitration*, vol. ii, 1349 seq.; Cobbett, *Cases*, vol. i, pp. 23 seq.; G. G. Wilson, *The Hague Arbitration Cases* (Boston and London, 1915), pp. 1 seq.



and the United States, on behalf of the Church, claimed payment of the interest as from that date, contending, *inter alia*, that the matter was *res judicata*—a contention which was upheld.

The Vene-  
zuelan debts.

In February, 1904, the court decided a question of the right to preferential treatment of Great Britain, Germany and Italy as creditors of Venezuela, over her other creditors, including Belgium, Spain and France. The debts were admitted, and by agreement a proportion of certain customs revenues had been appropriated to meet them. The decision was in favour of the three former powers, who had, in 1902, taken active steps to secure payment by blockading the Venezuelan ports.<sup>1</sup>

The  
Japanese  
house tax.

In 1904 and 1905, Great Britain, France and Germany claimed as against Japan that certain lands granted to them under perpetual leases were free of all charges and taxes, whereas Japan claimed the right to levy a tax upon the buildings erected thereon.<sup>2</sup> The decision of the Permanent Court in this case went against Japan, and was to the effect that the said leases confer an immunity on all the lands and on all the buildings thereon from 'all imposts, taxes, charges, contributions or conditions whatsoever other than those expressly stipulated in the leases in question.'

The Muscat  
Dhows.

In 1904 and 1905 a dispute came before the court between France and Great Britain in relation to the issue by France to subjects of the Sultan of Muscat of authority to fly the French flag, and as to the privileges of persons so authorised;<sup>3</sup> and the decision was in favour of the power to grant such authority, but subject to important limitations, substantially conceding the British case.

The North  
Sea incident.

All the above cases were decided by arbitrators chosen in accordance with the Convention setting up the Permanent Court; and they were on points of minor importance, dealing in two out of the four cases merely with money claims. By a curious and unexpected turn of events, the first really serious question, which might reasonably be said to involve 'honour and vital interests,' came before and was settled by the International Commission of Inquiry, whose scope had been so carefully limited and distinguished from that of an arbitration court. In October, 1904, the Russian Baltic Fleet, on its way to the East, fired upon the Hull fishing fleet off the Dogger Bank, sank one vessel, killed two men and wounded

<sup>1</sup> See p. 163, *supra*, p. 179, *infra*; and Wilson, *op. cit.* pp. 12 *seq.*

<sup>2</sup> Wilson, *op. cit.* pp. 40 *seq.*

<sup>3</sup> *Ibid.* pp. 64 *seq.*

several others; the explanation put forward being that Japanese torpedo-boats were concealed among the fishing vessels. Great Britain prepared to take action, and made immediate and urgent representations to the Russian Government, which, without admitting its commander to be in the wrong, expressed regret; and within the week the incident was referred to an International Commission under the rules of the Convention of 1899. The main question of fact was as to the presence of Japanese torpedo-boats; and by the Convention signed at St. Petersburg on November 25, 1904, the two powers agreed 'to entrust to an International Commission of Inquiry, assembled conformably to Arts. 9 to 14 of the Hague Convention of July 29, 1899, for the pacific settlement of international disputes, the task of elucidating, by means of an impartial and conscientious investigation, the question of fact connected with the incident which occurred during the night of October 21-22, 1904, in the North Sea, on which occasion the firing of the guns of the Russian fleet caused the loss of a boat and the death of two persons belonging to a British fishing fleet, as well as damages to other boats of the fleet and injuries to the crews of some of those boats.' The Commission was composed of five naval officers, one British, one Russian, two chosen by France and the United States and one by the Emperor of Austria; and the terms of reference extended beyond the mere question of fact:—'The Commission shall inquire into and report on all the circumstances relative to the North Sea incident, and particularly on the questions as to where the responsibility lies, and the degree of blame attaching to the subjects of the two high contracting parties, or to the subjects of other countries, in the event of their responsibility being established by the inquiry.' On February 26, 1905, the Commission issued its report, finding that no Japanese torpedo-boat was present, and that the Russian admiral was not justified in firing; and the Russian Government paid compensation, amounting to £65,000, the Board of Trade Inquiry having assessed the damages at £60,000.<sup>1</sup> It is to be noted, however, that the Russian member of the Commission dissented from the award.

On September 25, 1908, six soldiers (three of whom were Germans) of the French Foreign Legion at Morocco deserted at Casablanca and placed themselves under the protection of

The Casablanca case.

<sup>1</sup> Pearce Higgins, pp. 167-169; Smith and Sibley, *International Law as Interpreted during the Russo-Japanese War*, 2nd ed. p. 481, where the text of the Report of the Commission is set out.

the local German consul, who intended to put them on board a German vessel. On their way to the vessel they were forcibly taken from the agents of Germany by the French. The German Government claimed that it had exclusive jurisdiction over its three subjects in Morocco, demanded their surrender, and admitted that its consul was not entitled to grant his protection to non-German subjects. France, however, maintained that the deserters of German nationality did not cease to be amenable to her exclusive military jurisdiction. As the two powers failed to settle their conflicting contentions by diplomatic means, they agreed, November 10, 1908, to submit them to arbitration. By the award, May 22, 1909, the Hague Court held that the German consulate wrongfully attempted to embark on a German vessel the deserters from the French Foreign Legion who were not of German nationality, that it had not the right to grant its protection to the deserters of German nationality, and that it was wrong for the French military authorities to disregard the protection exercised over these deserters in the name of the German consulate.<sup>1</sup>

By a convention concluded on March 14, 1908, Norway and Sweden agreed to settle, by means of arbitration, differences relating to the maritime boundary between the two countries. The award was given on October 23, 1909, indicating the line of demarcation.<sup>2</sup>

The Permanent Court had before it in September, 1910, a question with regard to the right of fishing round the coasts of Canada and Newfoundland, which had been a matter of contention between Great Britain and Canada on the one hand, and the United States on the other, for over a century, and had at times brought these countries to the verge of war.<sup>3</sup> By the treaty of peace of 1783, Great Britain granted to the United States, then admitted to be independent, the right of fishing on the banks and coasts of Newfoundland, in the Gulf of St. Lawrence, and on the 'coasts, bays and creeks' of all other British North American territory, but with no right of drying and curing fish on the Newfoundland shores.<sup>4</sup> There followed, after the war of 1812, the dispute to which reference has already been made,<sup>5</sup> as to whether this right did or not survive the war—a dispute which was settled by a treaty of 1818. By that treaty liberty was granted to the inhabitants

<sup>1</sup> Wilson, *op. cit.* pp. 82 *seq.*

<sup>2</sup> *Ibid.* pp. 102 *seq.*

<sup>3</sup> See Cobbett, *Cases*, vol. i, pp. 153 *seq.*, and the references there cited; Wilson, *op. cit.* pp. 184 *seq.*

<sup>4</sup> Cf. Wheaton (ed. Phillipson), pp. 287, 288, 369.

<sup>5</sup> *Supra*, p. 151; Wheaton (ed. Phillipson), pp. 288, 370 *seq.*

Maritime  
frontier  
between  
Norway and  
Sweden.

The North  
Atlantic  
coast  
fisheries.



of the United States for ever, in common with the subjects of Great Britain, to fish on certain defined parts of the coast of Newfoundland, on the shores of the Magdalen Islands, and on the coasts, bays, harbours and creeks from a spot on the southern coast of Labrador, through the straits of Belleisle, and thence northward indefinitely, but subject to the rights of the Hudson Bay Company. In return, the United States renounced for ever the right of fishing within three marine miles of all the rest of the coast of British North America. Out of the terms of this treaty several questions arose, which were the subject of long and dangerous disputes. The United States claimed a right to take fish by persons other than their 'inhabitants'; refused to pay dues for fog alarms and stations; denied that their ships were bound, on entering Canadian territorial waters, to enter and clear at customs houses; and claimed that all laws and regulations for the fisheries must be made jointly, and not by Great Britain or Canada alone. Further, by the treaty the United States had the right to fish on the coasts of Newfoundland, and on 'the coasts, bays, harbours and creeks' of Labrador; and Great Britain contended that the difference in wording prevented the United States from fishing in the bays, harbours and creeks of Newfoundland. Finally, the broad question was raised as to the meaning of the three-mile limit in relation to bays and gulfs: the United States maintaining that the line followed the sinuosities of the coast, as against the British contention that British jurisdiction extended three miles seaward from a line drawn between the outer headlands of a bay or gulf however wide.

After a good deal of negotiation and various adjustments, the matter was eventually referred to the Permanent Court at the Hague, which sat during June, July and August 1910. Seven questions were put before the court, and the general result of the award was as follows: The right of Great Britain (including Canada and Newfoundland) to make regulations without the consent of the United States as to the exercise of the liberty to take fish referred to in Art. 1 of the treaty of 1818, in the form of municipal laws, ordinances or rules, is inherent in the sovereignty of Great Britain, but must be exercised subject to the limits laid down in the treaty, in that the regulations must be made *bona fide* and not in violation of the treaty; and regulations comply with this test which are (1) appropriate or necessary for the protection and preservation of the fisheries or (2) desirable or necessary on grounds of public order and morals, without unnecessarily interfering with



the fishery itself; and, in both cases, equitable and fair as between local and American fishermen, and not so framed as to give unfairly an advantage to the former over the latter class. The question of the reasonableness of particular regulations was left for the decision of a special tribunal of experts, or Permanent Mixed Fishery Commission, before which all objections made in future by the United States were to be laid.

On the second point it was decided that the inhabitants of the United States, while exercising their rights under the treaty, were entitled to employ as members of the fishing crews of their vessels persons not inhabitants of the United States; the persons so employed, however, to derive no benefit or immunity from the treaty. On the third question it was decided that the requirement that an American fishing vessel should report is not unreasonable, but only if there is a reasonably convenient opportunity afforded to report in person or by telegraph, at a customs house or to a customs official; that the exercise of the fishing liberty by the inhabitants of the United States should not be subject to the purely commercial formalities of report, entry and clearance at a customs house, or to light, harbour or other dues not imposed on Newfoundland fishermen. In the words of the recommendation accompanying the answer to question III, 'to impose such dues on American fishermen only would constitute an unfair discrimination between them and Newfoundland fishermen, and one inconsistent with the liberty granted to American fishermen to take fish, etc., in common with the subjects of his Britannic Majesty.' The fourth point was somewhat similar; and it was decided that it was not permissible to impose restrictions upon American fishermen making the exercise of the privileges granted to them by the treaty to enter certain bays or harbours for shelter, repairs, wood and water conditional upon the payment of light or harbour or other dues, or entering or reporting at customs houses, or any similar conditions. But it was declared to be reasonable, in order to prevent the abuse of these privileges, which were declared to be accorded by Great Britain on the grounds of hospitality and humanity, that the American fishermen entering such bays for any of such purposes and remaining more than forty-eight hours should be required, if thought necessary by Great Britain or the Colonial Government, to report, either in person or by telegraph, to a customs house or to a customs official, if reasonably convenient opportunity for such report is afforded.

The fifth point raised wider issues and resulted in a deci-

sion which, while limited, of course, to the facts of the case, may form an international precedent of very considerable importance. The question was, 'What is a bay within the meaning of the treaty?' The decision was very general in its terms:— 'In case of bays, three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast.' But it was recognised that for practical purposes this rule was unfortunately vague; and the court made certain specific recommendations. 'Considering, moreover, that in treaties with France, with the North German Confederation and the German Empire, and likewise in the North Sea Convention, Great Britain has adopted for similar cases the rule that only bays of ten miles' width should be considered as those wherein the fishing is reserved to nationals; and that in the course of the negotiations between Great Britain and the United States a similar rule has been on various occasions proposed and adopted by Great Britain in instructions to the naval officers stationed on these coasts; and that though these circumstances are not sufficient to constitute this a principle of international law, it seems reasonable to propose this rule with certain exceptions, all the more that this rule with such exceptions has already formed the basis of an agreement between the two powers,' it was therefore recommended that as a general rule 'the limits of exclusion shall be drawn three miles seaward from a straight line across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles';<sup>1</sup> while in a number of specified bays the line was drawn by the court, as a rule, from one lighthouse to another, on the general principle that 'where the configuration of the coast and the local climatic conditions are such that foreign fishermen, when within the geographic headlands, might reasonably and *bona fide* believe themselves on the high seas, the limits of exclusion shall be drawn in each case between the headlands specified as being those at and within which such fishermen might be reasonably expected to recognise the bay under average conditions.' From these rules two bays were expressly excluded, the Bay of Fundy and Conception Bay, and the right of innocent passage through the Gut of Canso which is not disputed.<sup>2</sup> The Bay of Fundy had been decided, on an

<sup>1</sup> This rule, found in the North Sea Fishery Convention of 1882, was suggested in the first draft of the Convention relative to Automatic Submarine Contact Mines (Convention VIII of 1907). See Pearce Higgins, *The Hague Peace Conferences*, p. 333.

<sup>2</sup> Cf. Westlake, Part I, p. 197.

arbitration under a Convention of 1853 between Great Britain and America, to be not a British bay within the meaning of fishery treaties between the two countries, it being very large and partly bordered by the State of Maine;<sup>1</sup> while Conception Bay was held to be British by the Privy Council in *The Direct United States Cable Co. Ltd. v. The Anglo-American Telegraph Co. Ltd.*,<sup>2</sup> a decision in which the United States had acquiesced.

On the sixth point it was decided that under the treaty the inhabitants of the United States were entitled to fish in the bays, creeks and harbours of the treaty coasts of Newfoundland and the Magdalen Islands, as they were in the bays, creeks and harbours of Labrador. On the seventh point it was decided that the inhabitants of the United States, whose vessels resort to the treaty coasts for the purposes of exercising the liberties of fishing, are entitled to have for those vessels, when duly authorised by the United States on that behalf, the commercial privileges on the treaty coasts accorded by agreement or otherwise to United States trading vessels generally; provided, however, that the liberty of fishing and the commercial privileges are not exercised concurrently.

The Orinoco  
Steamship  
Company.

Under an agreement entered into between the United States and Venezuela, February 13, 1909, the contracting parties consented 'to resort to the conciliatory means of arbitration . . . recognised by the entire civilised world as the only satisfactory means of terminating international disputes' for adjusting certain contending claims. The award of the court was pronounced on October 25, 1910.

The Savar-  
kar case.

The Savarkar case, which was decided on February 24, 1911, conformably to an arbitration agreement between Great Britain and France, October 25, 1910, has already been referred to.<sup>3</sup>

The Cane-  
varo claim.

On April 25, 1910, the Governments of Italy and Peru concluded an agreement, deciding to submit to the Permanent Court of Arbitration of the Hague a dispute arising out of a claim made by the former, in the name of three of its subjects, for the payment of the sum of forty-three thousand one hundred and forty pounds sterling and its legal interest demanded from the Peruvian Government. On May 23, 1912, the tribunal gave its award in favour of Italy, to the effect that the sum found to be due should be delivered to the Italian Legation at Lima on July 31, 1912.

<sup>1</sup> See *Direct United States Cable Co. Ltd. v. Anglo-American Telegraph Co. Ltd.* (1877), L.R. 2 A.C. 394, at p. 408.

<sup>2</sup> *Ibid.*

<sup>3</sup> See p. 87, *supra*.



Under the definitive treaty of peace between Russia and Turkey signed at Constantinople on January 27/February 8, 1879, it was stipulated that Turkey should pay Russia a certain indemnity, including a specified maximum sum representing the claims of Russian subjects and institutions in Turkey for damages suffered during the war. A disagreement having arisen as to the dates of payment and the interest demanded, an agreement was entered into at Constantinople on August 4, 1910—that is, more than thirty years after the war—for submitting the dispute, which diplomatic negotiation had failed to adjust, to the Hague Court of Arbitration. On November 11, 1912, the tribunal delivered its award, in which, after setting forth an elaborate statement of fact and of law (reinforced by numerous authorities), it was held 'that in principle the Imperial Ottoman Government was liable to the Imperial Russian Government for moratory indemnities from December 31, 1890/January 12, 1891, the date of the receipt of an explicit and regular demand for payment; but that, in fact, the benefit from this demand for payment having lapsed for the Imperial Russian Government as a result of the subsequent renunciation by its embassy at Constantinople, the Imperial Ottoman Government is not now held to pay interest-damages by reason of the dates on which the payments of the indemnities were made.' <sup>1</sup>

Interest on  
Turkish in-  
demnities  
due to  
Russian  
subjects.

During the Turco-Italian War, the *Manouba*, a French steamer plying between Marseilles and Tunis, was stopped in the Mediterranean by an Italian cruiser, January 16, 1912, and twenty-nine Ottoman passengers were arrested and made prisoners on the ground that they were Ottoman officers proceeding to the theatre of war. France having made a protest against this action, the prisoners were delivered to the French consul at Cagliari, who was to prevent those prisoners who belonged to the fighting forces from sailing from a French port to Tunis or to the scene of military operations; and on March 6, 1912, the parties entered into an agreement to refer the case to the Hague Permanent Court of Arbitration, Italy claiming that her action was taken conformably to the provision of Art. 47 of the Declaration of London, 1909. On May 6, 1913, the court made its award, declaring that the Italian naval authorities were not within their rights in capturing the French mail steamer and in taking her to Cagliari, but that when once she was captured and taken into port they were within their rights in temporarily and conditionally sequestering her in order to compel her captain to deliver up the twenty-nine

The  
*Manouba*.

<sup>1</sup> Wilson, *op. cit.* pp. 260 seq.



Turkish passengers; and it was held that Italy should pay France four thousand francs for losses and damages suffered by the individuals interested in the vessel and her voyage, by reason of the capture and the taking into port.<sup>1</sup>

The  
*Carthage*.

Another case decided by the court at the same time as the preceding case was that of the *Carthage*, a French steamer that was captured by an Italian cruiser and taken into port on the ground that she had on board an aeroplane destined for Tunis. The French Government protested against the capture, inasmuch as the destination was neutral, and aeroplanes are by Art. 24 of the Declaration of London conditional contraband. The parties accordingly submitted to the Hague tribunal the following questions for determination: (1) Were the Italian naval authorities within their rights in proceeding as they did to the capture and temporary seizure of the French mail steamer *Carthage*? (2) What pecuniary or other consequences ought to follow from the decision given upon the preceding question? The first question was answered in the negative, and therefore the answer to the second question was that Italy should pay France the sum of 160,000 francs, the amount of the losses and damages suffered by the private parties interested in the vessel and her voyage.<sup>2</sup>

The  
*Tavignano*.

The French steamer, *Tavignano*, having been seized by an Italian torpedo boat, January 25, 1912, and two Tunisian mahones, *Kamouna* and *Gaulois*, having been fired at by another Italian torpedo boat, the French Government protested, whereupon the parties agreed, April 15, 1912, to submit to an International Commission of Inquiry the questions raised, and to transmit the finding to the arbitral tribunal charged to determine the two previously cited cases, in order that a decision might be pronounced upon the questions of law. The Commission of Inquiry (consisting of two French naval officers, two Italian, and one—as president—British) made its report on July 23, 1912; but on May 2, 1913, the tribunal was notified that an arrangement had been reached between the parties, so that the case was withdrawn.<sup>3</sup>

Timor  
boundaries.

A dispute having arisen between the Netherlands and Portugal relative to the execution of the convention concluded between them at the Hague, October 1, 1904, as to the delimitation of Dutch and Portuguese possessions in the island of Timor, an agreement to arbitrate was entered into on April 3, 1913, and the award was given on June 25, 1914.<sup>4</sup>

<sup>1</sup> Wilson, *op. cit.* pp. 326 seq.

<sup>3</sup> *Ibid.* p. 372.

<sup>2</sup> *Ibid.* pp. 352 seq.

<sup>4</sup> *Ibid.* pp. 374 seq.

## PART III

# BELLIGERENCY, OR THE RIGHTS AND DUTIES OF STATES IN TIME OF WAR

## CHAPTER I

### PREBELLIGERENT ACTS; COMMENCEMENT OF WAR AND ITS EFFECTS

THE arbitrament of war is final—the *ultima ratio*—in the disputes of nations, and the points previously in issue *transcunt in rem judicatam* (are merged in the decision). War may be

Definition  
of war.

defined as 'the state or condition of Governments contending by force,'<sup>1</sup> and in ascertaining whether such a state or condition exists, the intention of the parties or either of them must be looked at. The mere commission of certain acts of force, hostility or unfriendliness is not sufficient. There are, for instance, certain acts warlike in their essence but traditionally held to fall short of war, to which a nation may resort when provoked under circumstances of too little moment to call for a declaration of war. It is always open to the power affected by such acts to treat their commission as an act of war; if it does not elect to do so, the peace is deemed to remain unbroken. The most familiar among them are retorsions, reprisals, and pacific blockades.

Forcible  
redress short  
of war.

Retorsion is the return in kind of acts which fall short of hostility but are marked by unfriendliness. Thus differentiation of tariff may be met by acts of retorsion on the part of the state injuriously affected.

Retorsion.

Reprisals<sup>2</sup> form the appropriate reply to particular acts of wrong, which the injured party is determined to resist unless satisfaction is given. In a passage<sup>3</sup> which has been often quoted, Vattel says: 'Reprisals are resorted to between two states to procure justice for themselves where it is not other-

Reprisals.

<sup>1</sup> Westlake, Part II (1913), p. 1.

<sup>2</sup> This form of reprisals is to be distinguished from the reprisals adopted by a belligerent during the continuance of actual warfare.

<sup>3</sup> *Droit des gens*, liv. ii, § 342.

wise obtainable. If a nation has seized what belongs to another, if it refuses to pay a debt, to repair injury, or make proper satisfaction therefor, the state injured may seize something belonging to the other and use it for its own advantage till it has obtained the amount of its damage with interest, or it may retain it as a pledge until the wrongdoer has rendered full satisfaction. The property so seized is kept as long as the hope of obtaining satisfaction remains; when it disappears confiscation ensues and reprisals have accomplished their object.'

Embargo. .

Embargo or sequestration is a familiar application of the above principle. A good illustration of this was the action of Great Britain in 1839, when she captured and laid an embargo upon Sicilian vessels, because the two Sicilies had granted a sulphur monopoly in violation of a commercial treaty; the Sicilian Government retaliating by a counter embargo. Of a somewhat similar nature (though approximating rather to pacific blockade) was the Don Pacifico incident in 1849, still remembered as the occasion of Lord Palmerston's famous *civis Romanus sum* speech. Don Pacifico, by birth in Gibraltar, had acquired British nationality; during his residence in Athens, his house was plundered by a mob with the countenance, it appeared, of some Greek soldiers. He claimed over £21,000, and the British Government, declining the jurisdiction of the native tribunals, demanded compensation. Meeting with a refusal, they instructed the British fleet to sequester all Greek ships found at sea. The commissioners to whom the claim was finally referred reduced the claim to £150.<sup>1</sup> Obviously the right of reprisal was in this case exercised by Great Britain with excessive rigour. (We may mention here that the sixth Convention of the Hague says that 'it is desirable' that the vessels of a belligerent in the port of the adversary at the outbreak of war should be permitted to leave.<sup>2</sup>) Again, in 1895, Great Britain seized the port of Corinto, in Nicaragua, and collected the customs duties there, until reparation was made for injuries that had been inflicted on British subjects. Similarly, in 1901, France seized the custom-house at Mitylene until certain claims of French subjects were satisfied. In 1908 Holland took possession of two Venezuelan gunboats for the purpose of enacting restitution for various grievances.

Reprisals may be defended on the ground that they form

<sup>1</sup> *Parl. Papers*, 1851; Phillimore, *Commentaries*, vol. iii, § 23.

<sup>2</sup> See *infra*, p. 189.



a convenient mode of procuring redress without necessarily involving war. The real character of such acts depends upon the conduct of the state at which they are directed. If it is induced to give the required satisfaction the reprisal ceases; if it refuses, 'the retroactive effect . . . impresses the direct hostile character upon the original seizure; . . . it is no longer an equivocal act.'<sup>1</sup>

The character of pacific blockade<sup>2</sup> has often been confusedly stated, and practice has not always been consistent. The name itself is somewhat misleading. As between the powers at issue such a blockade involves, as some forms of reprisal do, acts of constraint essentially non-pacific; but the view is now generally accepted that third powers may enter and leave the blockaded ports at pleasure. A state of war would be inconsistent with such a liberty, and from this point of view the blockade may be called pacific. Pacific blockade.

In the earlier instances of such blockade, it is true, the ships of third powers were sometimes confiscated (*e.g.* by France when blockading Mexican ports in 1838<sup>3</sup>), and sequestration without ultimate confiscation was frequent. In 1884 France blockaded Formosa and claimed to be entitled to capture and condemn the vessels of third powers while at the same time using Hong-Kong as a coaling station. This led to a declaration from Great Britain that 'the contention . . . that a pacific blockade confers on the blockading power the right to capture and condemn the ships of third nations for a breach of such a blockade is in conflict with well-established principles of international law.'<sup>4</sup> In principle this declaration was unanswerable; unless it was directed against sequestration as well as condemnation, in which case it was hardly supported by international practice. Great Britain followed it up by treating the situation as a state of war, and forbidding the coaling of French vessels at British ports. The blockade of Venezuela by Great Britain and Germany in 1902 was of an ambiguous character. Great Britain instructed her fleet to seize and hand over to a prize court vessels of other nations than Venezuela, and in a proclamation at Trinidad a state of war was recognised. The German fleet actually bombarded

<sup>1</sup> Per Lord Stowell in *The Boedes Lust* (1804), 5 C. Rob. at p. 246.

<sup>2</sup> On pacific blockade, see Westlake, article in his *Collected Papers* (1914), pp. 572 *seq.*; A. E. Hogan, *Pacific Blockade* (Oxford, 1908).

<sup>3</sup> Westlake, Part II, p. 12.

<sup>4</sup> Lord Granville to M. Waddington, Nov. 11, 1884: *Parl. Papers, France*, No. 1, 1885; Westlake, Part II, p. 14.



Venezuelan ports. In the final settlement between Great Britain and Venezuela it was recognised that it might reasonably be contended that there was a state of war; but neither of the blockading powers in fact confiscated any vessels either belonging to Venezuela or any other power.<sup>1</sup> 'Pacific' is also a word of doubtful application to the blockade of Crete by the European powers in 1897, for there, too, the blockading forces fired on the inhabitants.

Legality  
questioned.

The legality of this form of blockade has been repeatedly questioned, and we may refer to the frank admission by Lord Palmerston in 1846.<sup>2</sup> 'The real truth is, though we had better keep the fact to ourselves, that the French and English blockade of the Plata has been from first to last illegal. Peel and Aberdeen have always declared that we have not been at war with Rosas; but blockade is a belligerent right, and unless you are at war with a state, you have no right to prevent ships of other states from communicating with the ports of that state—nay, you cannot prevent your own merchants' ships from doing so.' Whether Palmerston was right as to the control of the executive over merchant vessels in its relation to foreign powers is not so clear as he appears to have imagined;<sup>3</sup> nor is it by any means certain that the right to interfere with the vessels of third parties will never again be asserted. But such a right cannot be defended on principle, whatever justification it may receive from precedent, and, indeed, the whole institution of pacific blockade is an anomaly, and its main, if not only, justification is that it has often been effective in securing its object without bloodshed.

Rules of  
Institute of  
International Law.

Owing to the difference of opinion and practice in regard to pacific blockade, it is of interest to note the principles formulated by the Institute of International Law in 1887:<sup>4</sup>

- (1) Ships under a foreign flag may enter freely despite the existence of the blockade.
- (2) The pacific blockade must be officially declared and notified, and maintained by an adequate force.
- (3) The ships of the blockaded power that do not respect the blockade may be sequestered; and when the blockade is at an end they must be restored to their owners with their cargoes, but without indemnity on any ground.

<sup>1</sup> Westlake, Part II, p. 15.

<sup>2</sup> Quoted in Hall, 7th ed. p. 386.

<sup>3</sup> See Westlake, Part II, p. 13.

<sup>4</sup> *Annuaire de l'institut de droit int.*, vol. ix (1887), p. 300.

For a considerable time it was thought in theory—even then there was no unanimity of opinion<sup>1</sup>—to be necessary that the outbreak of war should be preceded by a solemn declaration. This theory, probably a survival of the mediæval custom, was very frequently disregarded in practice, there being either no declaration at all, or a declaration at some date, sooner or later, after the first act of hostility.<sup>2</sup> It has been calculated<sup>3</sup> that out of about a hundred and twenty wars that took place between 1700 and 1872 there were only some ten cases in which a formal declaration was made before an overt commencement of hostilities. However this may be, it became customary in the latter part of the nineteenth century to issue a manifesto announcing the outbreak of war. Thus, the Crimean War was preceded by formal declarations; similarly in the case of the Franco-German War in 1870, the Spanish-American War in 1898, and the Boer War in 1899. In 1904 Russia complained because the formal declaration from Japan came two days later than the first attack.<sup>4</sup> There has been, therefore, a growing tendency of late, before the agreement at the Hague in 1907, to respect the old theory. It must be remembered, of course, that the occurrence of a state of war imposes serious duties upon neutrals. Belligerents are vitally concerned in the discharge of these duties; and responsibility for their exercise can only arise after due notification to neutral powers that a state of war exists. In order to give such notice, states declaring war usually publish within their own territory and send to neutrals a manifesto, giving notice of the outbreak of hostilities. But such a proceeding cannot be taken as an admission of any obligation to warn the enemy of the coming attack.

At the Hague Peace Conference in 1907 a Convention<sup>5</sup> was drawn up, the preamble of which recited the importance of the principle that hostilities should not commence without previous warning, and that neutrals should without delay be notified of the existence of a state of war; and the contracting powers recognised 'that hostilities between them must not commence without a previous and explicit warning in the form of either a declaration of war, giving reasons, or an

Declaration  
of war.

The Hague  
rules.

<sup>1</sup> Cf. *The Eliza Ann* (1813), 1 Dods. 244.

<sup>2</sup> Hall, 7th ed. pp. 390 *seq.*; Pearce Higgins, *The Hague Peace Conferences*, p. 202.

<sup>3</sup> Major-Gen. J. F. Maurice, *Hostilities without Declaration of War* (London, 1883).

<sup>4</sup> Cf. *Revue générale de droit international public* (Paris, 1904), pp. 134, 149; Cobbett, *Cases*, vol. ii. pp. 1 *seq.*

<sup>5</sup> No. III of 1907.

ultimatum with a conditional declaration of war';<sup>1</sup> and that 'the existence of a state of war must be notified to the neutral powers without delay, and shall not be held to affect them until after the receipt of a notification, which may, however, be given by telegraph.'<sup>2</sup> The absence or non-receipt of such notification, however, is not to be taken as a justification of breaches of neutrality committed with knowledge in fact of the existence of a state of war.<sup>3</sup> Surprise attacks are still possible; for it was not found practicable to lay down any rule requiring the lapse of even the shortest time between the notification and the first act of hostility; though it may probably be taken that an attack without previous negotiations or any apparent ground of quarrel will be always regarded as an outrage.<sup>4</sup> (This Convention (No. III of 1907) was ratified on behalf of Great Britain in November, 1909.) In the Turco-Italian war in 1911, and in the Great War in 1914,<sup>5</sup> the rules of the Hague Convention were observed by the belligerents.

Persons  
affected by  
war.

The commencement of war produces immediate results of far-reaching consequence to the citizens of the states involved. The right to recover debts from, and the liability to be sued by, enemy subjects are suspended during the war<sup>6</sup> (but revive on the conclusion of peace<sup>7</sup>), and partnerships with them are immediately dissolved.<sup>8</sup> A company incorporated in

<sup>1</sup> Art. 1. It appears that German forces invaded French territory on Aug. 2, 1914, before their Government made a formal declaration of war: *Parl. Papers, Misc. No. 10* (1915), p. 234. On the other hand, Germany imputed prior hostile acts to French troops, *ibid.* p. 240.

<sup>2</sup> Art. 2.

<sup>3</sup> Pearce Higgins, p. 203; Westlake, Part II, p. 23.

<sup>4</sup> See Phillipson, *Int. Law and the Great War*, pp. 53 seq. But see n. 1, *supra*.

<sup>5</sup> At the Hague, in 1907, an Article (23h of the Regulations) was adopted which appeared to change the law in this respect, and there is still a difference of opinion as to its interpretation. See *infra*, p. 211.

<sup>7</sup> *Ex parte Boussmaker* (1806), 13 Ves. 71; Scott, *Cases*, 494.

<sup>8</sup> *Griswold v. Waddington* (1819), 16 Johnson, 438. Cf. *The Manningtry* (1915), 1 P.C. 497 (where property belonging to a firm whose house of trade is in enemy territory, the shares attributable to British partners domiciled in England are confiscable, unless they took immediate steps on the outbreak of war to withdraw from the firm). *The Derfflinger* (No. 3) (1915), 1 P.C. 643 (dissolution of partnership). *The Anglo-Mexican* (1917), 34 T.L.R. 149; the Privy Council held: Where at the outbreak of war a neutral, wherever resident, was a partner in a house of business trading in or from an enemy country, he has a commercial domicile in that enemy country and is to be deemed an enemy in respect of his property or interest in such business, unless he has within a reasonable interval after the outbreak of war discontinued or taken steps to dissociate himself from the business; but if the goods were at sea at the outbreak of war and have been captured before such reasonable interval has elapsed, the Court will in a proper case take notice of a discontinuance or dissociation after the capture. In *Rodriguez v. Speyer Bros.* (1918), *Times*, Aug. 3, the House of Lords decided (by 3 to 2) that a firm of six members, of whom one was an enemy alien, might sue for payment of a debt incurred before the war.



the United Kingdom is a legal entity, being neither friend nor enemy, which can act only through duly authorised agents; and so long as it is carrying on business here through agents resident here or in a friendly country it is in the position of a friend. If its agents *de facto* are resident in an enemy country or are acting under the control of enemies, it is in the position of an enemy. The character of individual shareholders does not of itself suffice to affect the character of the company, though the enemy character of individual shareholders and their conduct may be material in determining whether the agents of the company are in fact acting under enemy control.<sup>1</sup> New contracts are forbidden<sup>2</sup> and, speaking generally, intercourse between the individuals of belligerent states is only permitted under exceptional circumstances.

This practice flows logically from the view that the subjects of an enemy state are themselves enemies, a view which found its extreme expression in the ancient formula, 'courir sus aux ennemis,' which was an instruction to all loyal subjects to kill, capture and pillage all subjects of the enemy state. Certain theorists have committed themselves to the doctrine that the non-combatant individuals of belligerent communities are not affected by enemy character. Thus Rousseau, in a well-known passage, said:<sup>3</sup> 'La guerre n'est point une relation d'homme à homme, mais une relation d'état à état . . . chaque état ne peut avoir pour ennemis que d'autres états, et non pas des hommes, attendu qu'entre choses de diverses natures on ne peut fixer aucun vrai rapport.'

It is sufficient to say of this view that it has little correspondence with the actual practice of nations. If it were well founded, acts done without question in almost every war, against both the persons and properties of civilians, would be illegal. The English view hereon was stated clearly enough by Willes, J., in *Esposito v. Bowden*:<sup>4</sup> 'It is now fully established that the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown,

<sup>1</sup> *Daimler Co. v. Continental Tyre and Rubber Co.* [1916] 2 A.C. 307, H.L. Cf. Trading with the Enemy Amendment Act, 1916 (5 & 6 Geo. V, c. 105), s. 15.

<sup>2</sup> *The Hoop* (1799), 1 C. Rob. 196; Scott, *Cases*, 521; *Ex parte Boussmaker*, *supra*. See also certain cases during the Great War: *The Barenfels* (No. 2) (1915), 1 P.C. 395 (acceptance of a bill of exchange).

<sup>3</sup> *Contrat social*, liv. 1, chap. iv.

<sup>4</sup> (1857), 7 E. & B. at p. 779.



is illegal.' Subjects of a state allied to Great Britain are under the same obligations to Great Britain in regard to intercourse with the enemy as British subjects are.<sup>1</sup>

These and the like questions are usually regulated by the legislation of each belligerent,<sup>2</sup> and invariably on the basis of reciprocity. Thus, the principles set forth above, which are representative of the Anglo-American doctrine and practice, were applied by Great Britain soon after the outbreak of the Great War in 1914.<sup>3</sup> A rapid succession of Acts, Proclamations, Orders and Regulations appeared with regard to trading with 'alien enemies.' Commercial or war domicile was made the criterion of enemy or neutral character for this purpose. Contracts made before the war with firms or persons in enemy territory were not to be performed during the war, and payments due under them were to cease. New contracts were not to be entered into. Restrictions were imposed on the payment of dividends, and debts in general, to alien enemies.

A great number of cases involving these matters were decided in the courts. Thus—to give but one or two illustrations in addition to the cases already referred to—in *Inge v. Continental Insurance Co. of Mannheim*,<sup>4</sup> it was held that the defendant company was not an 'alien enemy' for the purpose of enforcing a policy of insurance effected before the war through underwriters employed by the company in this country. The ground of the judgment was that the company was not, with regard to this business, separated from us by the 'war line,' which alone—and not necessarily nationality or ordinary domicile—was the determining factor of enemy character, at least for commercial purposes. In another case,<sup>5</sup> a plaintiff, being an enemy subject, was declared to be entitled to relief in our courts in regard to libel, on the ground that having duly registered herself in accordance with existing provisions, she came under the King's protection. Again, though an enemy alien is not entitled to appear as a plaintiff during the war for the purpose of enforcing a claim against a British subject, none the less he could appear as a defendant; for to suspend a subject's right of suit against an alien enemy, whereby the object and reason of the suspensory rule would be defeated,

<sup>1</sup> *The Panariellos* (1915), 1 P.C. 195; affirmed (1916), 2 P.C. 47; *The Parchim* (1915), 1 P.C. 579, at p. 588.

<sup>2</sup> Cf. the Trading with the Enemy Acts, 1914 and 1915, and the Proclamations thereunder.

<sup>3</sup> See Phillipson, *Int. Law and the Great War*, pp. 100 seq.

<sup>4</sup> (1914), 31 T.L.R. 41; [1915] 1 K.B. 227.

<sup>5</sup> *Thurn and Taxis (Princess) v. Moffitt* (1914), 31 T.L.R. 24; [1915] 1 Ch. 58.

would be turning the latter's disability into a relief.<sup>1</sup> In 1915 the Court of Appeal considered the whole question of the *locus standi* of enemy aliens.<sup>2</sup> The Lord Chief Justice, delivering the unanimous judgment of the court, pointed out that the test for commercial purposes of enemy alienage was the place of carrying on business.<sup>3</sup> Alien enemies possess no civil rights, unless they are here by permission and under the protection of the Crown; for under the old common law their property or debts found within the realm were confiscable.<sup>4</sup> Alien enemies are liable to be sued during the war, and may appear and be heard in their defence; and if judgment is given against them they may appeal to a higher court, so that an error, if any, may be rectified. But if notice of appeal had been given before the war by a person who becomes an alien enemy on the outbreak of war, the hearing of his appeal must be suspended until the conclusion of peace.

So far as the appearance of enemy aliens in the Prize Court is concerned, the President decided in November, 1914, that the practice of the Court would be that where an alien enemy claimed protection, privilege or relief under a Convention of the Hague, he would be permitted to appear as a claimant and argue his claim before the Court.<sup>5</sup>

The practice of 'crippling the enemy's commerce' by capturing private property on the sea is generally admitted to be legitimate under the existing law of nations (though whether it ought to be permitted is a matter of controversy<sup>6</sup>); it is inconsistent with the doctrine which so many publicists have borrowed from Rousseau. At all events, whatever doctrine is maintained, the practice in the Great War of capturing and destroying private property at sea was carried to an extent that was unparalleled in the recorded history of the world. The commencement of war, then, puts an end to non-hostile intercourse between subjects of the belligerent parties. In certain circumstances, however, it may be found undesirable

Licence to trade.

<sup>1</sup> *Robinson & Co. v. Continental Insurance Co. of Mannheim* (1914), 31 T.L.R. 20; [1915] 1 K.B. 155. See the Legal Proceedings against Enemies Act, 1915 (5 Geo. V, c. 36).

<sup>2</sup> *Porter v. Freudenberg, etc.* (1915), 1 K.B. 857; 31 T.L.R. 162.

<sup>3</sup> Cf. *Janson v. Driefontein Mines* (1902), App. C. 484.

<sup>4</sup> Hale, *Pleas of the Crown*, i, 95. Cf. *Wolff v. Oxholm* (1817), 6 M. & S. 102, per Lord Ellenborough; *Antoine v. Morshead* (1815), 6 Taunt. 238.

<sup>5</sup> *The Möwe* (1914), 1 P.C. 60. Cf. *The Gutenfels* (1915), 1 P.C. 102 (before the Prize Court sitting at Alexandria). Similar decision in the French Prize Court: *The Czar Nicolai II* (1914), *Journal officiel*, April 19, 1915.

<sup>6</sup> See pp. 255 seq., *infra*.

to carry this doctrine to an extreme conclusion, and the convenience of belligerents has provided conditions under which such exceptional intercourse becomes permissible. By giving a passport, a belligerent Government authorises an enemy subject to travel generally in his territories. A safe-conduct is a licence, similarly given, to travel to a particular place for a particular purpose.<sup>1</sup> A licence to trade is a permission by a belligerent state to its own subjects, or to enemy subjects, or both, to carry on a mutual trade notwithstanding the war in which they are engaged. Such licences are of course only effective in the courts of the issuing power, and cannot in any way affect the other belligerent. It is strictly necessary that they should emanate from the sovereign power, and, if they are issued by subordinates, the authority will be jealously scrutinised and will in no case be presumed.<sup>2</sup>

The general principle involved in the concession of licences to trade was well laid down by Lord Ellenborough in *Usparicha v. Noble*:<sup>3</sup> 'The legal result of the licence granted in this case is, that not only the plaintiff, the person licensed, may sue in respect of such licensed commerce in our courts of law, but that the commerce itself is to be regarded as legalised for all purposes of its due and effectual prosecution. To hold otherwise would be to maintain a proposition repugnant to national good faith and the honour of the Crown. The Crown may exempt any persons and any branch of commerce, in its discretion, from the disabilities and forfeitures arising out of a state of war; and its licence for such purpose ought to receive the most liberal construction. . . . For the purpose of this licensed act of trading (but to that extent only) the person licensed is to be regarded as virtually an adopted subject of the Crown of Great Britain; his trading, as far as the disabilities arising out of a state of war are concerned, is British trading.' Any misdescription or misrepresentation in procuring the licence will invalidate it,<sup>4</sup> and no unnecessary deviation from the course is permitted.<sup>5</sup> The validity of a licence is destroyed if it is fraudulently altered.<sup>6</sup>

State debts.

The rule as to the suspension of contractual relations

<sup>1</sup> The safe-conduct given by the British Government to Captain von Papen in 1915, when he withdrew from his post of military attaché to the German Embassy at Washington, was not regarded as covering his luggage.

<sup>2</sup> *The Hope* (1813), 1 Dods. Ad. 226.

<sup>3</sup> (1811), 13 East, 332, at p. 340.

<sup>4</sup> *Klingender v. Bond* (1811), 14 East, 484.

<sup>5</sup> *The Emma* (1810), Edwards, 366.

<sup>6</sup> *The Louise Charlotte de Guideroni* (1813), 1 Dods. 308.



during a war does not enable a state to repudiate its obligations to enemy subjects in respect of state debts. The action of Frederick the Great in 1753 in withholding payment of the interest upon the Silesian loan<sup>1</sup> is not strictly in point. It was a case of reprisals by a neutral for captures of ships, the validity of which he disputed; but opinions on the operation were so unanimously adverse that the inviolability of the claim of a state's debtor has been treated ever since as beyond dispute. Indeed, any state which was suspected of being likely to question it would suffer heavily in the rate of interest it would have to pay.

Mediæval statesmen showed no indulgence to resident enemies, and Grotius<sup>2</sup> fully admitted that such persons might be treated as prisoners while the war lasted. He adds, however, that they ought to be released as soon as hostilities come to an end.<sup>3</sup> For many centuries a common stipulation in commercial treaties provided that the subjects of the contracting powers should have liberty to withdraw from each other's territories on the outbreak of war.<sup>4</sup> Modern usage appears to have established the rule, that such persons, independently of treaty, must be allowed a reasonable period within which to withdraw. The progressive principle was long ago stated by Vattel,<sup>5</sup> to the effect that the sovereign who declares war cannot detain those subjects of the enemy who are within his dominions, and that he must allow a reasonable period for withdrawal, on the ground that his permission to enter the territory tacitly involved a promise to afford protection and liberty to return.

Enemy persons in a state at the commencement of hostilities.

In this country *Magna Carta*, with admirable prudence, provided that enemy merchants found in England on the outbreak of war should be arrested without injury to person or property, until it was ascertained how English merchants were treated by the enemy. The conduct of France in arresting all British subjects in that country, on the outbreak of war in 1803, has been universally condemned, and it is significant that even Napoleon attempted to justify the step as a retaliation, thus tacitly admitting its illegality under ordinary conditions. His action appears the more outrageous when it is

<sup>1</sup> Cf. De Martens, *Causes célèbres*, vol. ii, p. 97; Sir E. Satow, *The Silesian Loan* (1915).

<sup>2</sup> *De Jure Belli ac Pacis*, III, ix, 4.

<sup>3</sup> In his day, ordinary prisoners were not released as a matter of course.

<sup>4</sup> Cf. Bynkershoek, *Quæst. Jur. Pub.* I, c. iii.

<sup>5</sup> *Droit des gens*, liv. III, chap. iv, § 63.



remembered that in 1756 England had given the singular permission to French subjects to continue their residence in this country, on the condition of good behaviour during the war between the two countries. A similar tolerance has been so often stipulated for in treaties, that expulsion is now considered a vexatious exercise of strict belligerent rights, unless the circumstances are in some way exceptional. Permission to remain involves permission to hold property and to carry on trade, so long as such trade is not with enemy subjects abroad; and the immunity of the private property of persons so remaining may now be taken to be extended to the private property of all enemy subjects whether they are in the country or not. Such immunity is in many cases secured by treaty; it was recognised by the British Courts so early as 1817,<sup>1</sup> though there are British and American decisions to the contrary; and it is a legitimate deduction from the modern principle of the immunity of private property on land which we shall see illustrated in relation to the laws of war. On the outbreak of the Crimean War, Russian merchants were not required to withdraw from England nor English from Russia. In 1870 Prussians resident in France were allowed to stay during good behaviour and *vice versa*. The permission to Prussians was afterwards cancelled under circumstances of exceptional difficulty, so far as the department of the Seine was concerned. In the Græco-Turkish War, 1897, Greece allowed Turkish subjects to remain subject to good conduct, but Turkey called upon Greek subjects to withdraw—though the order was postponed from time to time, and the war ended before the time fixed had expired. In the Spanish-American War, 1898, the American Government authorised Spanish residents to remain, but warned them that they were objects of suspicion. In the South African War, 1899, the majority of the British subjects were ordered to leave the Transvaal and Orange Free State within the space of forty-eight hours. In the Russo-Japanese War, 1904, Japan allowed Russian subjects to remain subject to good conduct and registration, and pointed out that such permission was merely an act of grace; Russia allowed Japanese subjects to remain in any part of her territory save her possessions in the Far East. In the Turco-Italian War, 1911, Turks were permitted to remain in Italy; but Turkey expelled Italians, except certain classes, eight months after the outbreak of the war.

**Internment.** A case in which arrest and detention might perhaps be

<sup>1</sup> *Wolff v. Oxholm* (1817), 6 M. & S. 92; and cf. Westlake, Part II, p. 47.

justified is that in which foreign subjects on returning to their own country would be liable to military service; for it is not reasonable to expect a state to allow a substantial portion of the enemy's army to join the colours. In the Great War, the belligerent states generally had recourse to the practice of internment in the case of men, and registration and surveillance in the case of women.<sup>1</sup> Persons so interned have been held to be prisoners of war, so that a writ of *habeas corpus* is not issuable on their behalf;<sup>2</sup> but they are not debarred from maintaining an action.<sup>3</sup>

It is thus obvious that there is no fixed rule of international law on the subject. The conduct of states will, as a rule, depend on considerations of reciprocity. It is, however, a modern customary rule that enemy subjects who are permitted or compelled to remain should not be treated as prisoners of war or subjected to unnecessary hardships. On grounds of public safety they may be removed from certain specified districts, and taken to places at a distance from the theatre of war or from localities where military preparations and important war work are in progress. Those who voluntarily remain after permission to withdraw has been granted to them owe a local allegiance; so that if they joined their countrymen who managed to invade the country they would be punishable for high treason after the withdrawal of the invaders.<sup>4</sup>

The question of merchant vessels found at the outbreak of hostilities in enemy ports has received special treatment. It was the old custom to place an embargo upon these before war broke out, thereby condemning them as good prize in advance, under the name of 'droits of admiralty.'<sup>5</sup> From about the middle of the nineteenth century, however—a period in which several important departures from old international practice were made—it became customary to allow them a certain length of time for loading or unloading and clearing. Thus, in the Crimean War, the merchantmen of Russia and Turkey were allowed to leave each other's ports, and England and France gave Russian vessels six weeks' grace, Russia bestowing a similar exemption. The same practice was adopted in subsequent wars, including the Austro-Prussian War, 1866,

Enemy  
merchant  
vessels in  
port at out-  
break of war.

<sup>1</sup> Cf. the Aliens Restriction Act, 1914, and the Orders in Council thereunder.

<sup>2</sup> Cf. *R. v. The Superintendent of Vine St. Police Station, ex parte Liebmann* [1916] 1 K.B. 268.

<sup>3</sup> *Schaffenius v. Goldberg* [1916] 1 K.B. 284.

<sup>4</sup> Cf. *De Jager v. Attorney-General for Natal* (1907), App. C. 326.

<sup>5</sup> Hall, 7th ed. p. 388; Pearce Higgins, p. 300; Westlake, Part II, p. 42.

the Franco-German War, 1870, the Russo-Turkish War, 1877, the Spanish-American War, 1898—a month being granted by the United States and the immunity interpreted by the American courts as extending to merchantmen that had left port before the outbreak of war<sup>1</sup>—and the Russo-Japanese War, 1904.

At the Hague Conference in 1907, the modern practice was embodied in a Convention<sup>2</sup> which, however, imposed no obligation to grant days of grace, and did not specify the time which should be allowed. It was agreed that 'when a merchant ship<sup>3</sup> belonging to one of the belligerent powers is at the commencement of hostilities in an enemy port,<sup>4</sup> it is desirable that it should be allowed to depart freely either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination, or any other port indicated to it. The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant<sup>5</sup> that hostilities have broken out.'<sup>6</sup> This was merely a recognition of the existing practice; it was a step in advance to declare that vessels and cargo unable to leave within the time allowed should not be confiscated but merely detained during the war, or requisitioned on payment of compensation.<sup>7</sup> The principle of exemption was extended to vessels which left their last port of departure before the commencement of the war and are encountered on the high seas while ignorant of the outbreak of hostilities;<sup>8</sup> these, too, are only to be detained, and if they

Enemy merchant vessels on the high sea ignorant of hostilities.

<sup>1</sup> See *The Buena Ventura* (1899), 175 U.S. 388. Cf. *The Panama* (1899), 175 U.S. 535; *The Pedro* (1899), 175 U.S. 354.

<sup>2</sup> No. VI of 1907. It was ratified by Great Britain in November, 1909.

<sup>3</sup> In *The Germania* (1915), 1 P.C. 573, it was held that this provision is applicable only to merchant ships, i.e. to vessels engaged in commerce; hence a German yacht detained in a British port on the outbreak of war is confiscable; affirmed by the Privy Council (1917), 2 P.C. 365.

<sup>4</sup> In *The Mōwe* (1914), 1 P.C. 60, and *The Belgia* (1915), 1 P.C. 303, it was held that the word 'port' in the Article does not mean fiscal port, but must be interpreted in its usual and limited popular or commercial sense as a place where ships usually come to load or unload.

• <sup>5</sup> A vessel that is fitted with wireless installation and is within a reasonable distance of communications is presumed to possess knowledge of important current international events, but the presumption is rebuttable: *The Gutenfels* (No. 2) (1915), 2 P.C. 136.

<sup>6</sup> Art. 1.

<sup>7</sup> Art. 2. In *The Gutenfels*; *The Barenfels*; *The Derfflinger* (1916), the Privy Council held that if the course provided by Art. 1 as 'desirable' be not adopted, Art. 2 does not apply to vessels in the position referred to in Art. 1, and is not obligatory.

<sup>8</sup> Art. 3. The application of this Article was considered in *The Mōwe* (1914), 1 P.C. 60.



are requisitioned or destroyed compensation must be paid and provision must be made for the safety of persons and papers on board. The same exemption was applied to enemy cargo on such ships.<sup>1</sup> But Germany and Russia declined to agree to these last Articles (*i.e.* 3 and 4), considering that they imposed too heavy a burden upon states which did not possess naval stations to which such vessels can conveniently be taken;<sup>2</sup> and the United States objected to the Convention, which she held to be of a retrogressive character—the clause making ignorance of the outbreak of the war a condition of exemption was also deprecated.<sup>3</sup> Finally, it was agreed that the Convention should not refer to ships ‘whose construction indicates that they are destined to be transformed into warships’;<sup>4</sup> but as to what ships are of this character there are likely to arise several nice questions of fact: questions which, in view of the permissive character of the whole Convention, are not likely to be definitely settled.

Reference may be made to the practice in the Great War, as illustrating the application of the Hague Convention. Great Britain allowed ten days to enemy merchantmen under 6,000 tons in burden, subject to reciprocal treatment, as the rule under the Convention was a ‘desirable’ one, *i.e.* optional. Germany failing to give assurances as to reciprocity, her vessels became liable to seizure;<sup>5</sup> Austria giving such assurances received the benefit of the new rule. Turkey and Bulgaria not being parties to the Convention, their vessels did not receive its benefits.

The course adopted with regard to German vessels was as follows. The Procurator-General moved for their condemnation, and as soon as their enemy character was proved the Prize Court ordered them to be delivered to the marshal of the Court, and the freight to be paid into court until further order—no final decree having been made. Thereupon the Admiralty may make an affidavit for the purpose of requisitioning the vessels, and under the Prize Rules, 1914, Ord. XXIX, the judge may order them to be delivered to the Admiralty on payment into court of their appraised value; but appraisement may be dispensed with if the Crown requires the

<sup>1</sup> Art. 4.

<sup>2</sup> Pearce Higgins, p. 304.

<sup>3</sup> Cf. J. B. Scott, *The Hague Peace Conferences*, 2 vols. (Baltimore, 1909), vol. ii, p. 568.

<sup>4</sup> Art. 5.

<sup>5</sup> *The Chile* (1914), 1 P.C. 1; *The Marie Glaeser* (1914), 1 P.C. 38; *The Perkeo* (1914), 1 P.C. 136. France adopted a similar course: cf. *The Porto* (1914), *Journal officiel*, March 30, 1915; *The Barmbek* (1914); *The Czar Nicolai II* (1914), *Journal officiel*, April 19, 1915.



ships immediately. The question of compensation and other relative matters are postponed until the conclusion of peace.<sup>1</sup>

Vessels taking refuge in British ports in order to escape capture have been held by our Prize Court not to be protected by the above Convention.<sup>2</sup>

It has also been held that vessels having been offered a pass for departure and not having availed themselves of the offer are subject to condemnation.<sup>3</sup>

Recognition  
of belliger-  
ency.

The right to declare war or conclude peace is inherent in every independent state; and as soon as the one or the other is established it is incumbent on third states to recognise the fact. Thus in case of war neutrals are bound to recognise the status of belligerency of the adversaries, and are therefore obliged to observe certain newly created obligations incidental to their own status of neutrality. But on the outbreak of rebellion or of revolutionary disturbance in a foreign country, a difficult question often confronts foreign Governments. It becomes necessary to decide whether the hostilities are of such a character as to justify them in conceding to the revolting faction the status of belligerents. Recognition of belligerency will naturally long precede recognition of independence, and its justification must depend upon quite different grounds. The right to treat insurgents as belligerent persons is based on the material interests of the foreign Government, which may be gravely compromised by equivocal disturbances. Following this principle as a guide, it becomes necessary to distinguish

<sup>1</sup> *The Antares* (1915), 1 P.C. 261; *The Zamora* (1915), 1 P.C. 309. On appeal, (1916), 2 P.C. 1, the Privy Council reversed the decision in the latter case, and held that (1) the Prize Court administers international and not municipal law, is not bound by Orders in Council, and Order XXIX is only a direction to the Court in cases where the Crown is entitled under international law to requisition vessels or goods of enemies or neutrals; (2) the Court is not entitled to order the sale or realisation of property in its custody pending the determination of its ownership, and the power to sell or realise is exercised in cases where the property is perishable and difficult to preserve; (3) a belligerent is entitled under international law to requisition detained vessels or goods pending adjudication, if they are urgently required for purposes of national security, and the Court has decided that such right is exercisable in the circumstances of the case. See also *The Canton* (1916), 2 P.C. 264 (before the Privy Council).

<sup>2</sup> Cf. *The Belgia* (1915), 1 P.C. 303; (1916), 2 P.C. 32; *The Marquis Bacquehem* (1916), 2 P.C. 58; *The Prinz Adalbert* (1916), 2 P.C. 70.

<sup>3</sup> *The Achaia* (1915), 1 P.C. 242; affirmed (1916), 2 P.C. 45; *The Pindos* (1915), 1 P.C. 248; *The Concolorado* (1915), 1 P.C. 390 (where it was held that the master's lack of funds does not constitute *force majeure* or a circumstance beyond his control, within the meaning of the sixth Convention); decision affirmed on appeal (1916), 2 P.C. 64.

between cases when the civil hostilities are confined to land, and those when they extend to the sea. In the first case the neutral has little to gain by an early recognition of belligerency; in the second, such a recognition need not be delayed a moment after it has become clear that an organised struggle is in progress. Either there is a war in such a case or there is not; if there is, it may properly be recognised, if there is not, blockades, contraband restrictions and the right of search are alike illegitimate. It may therefore be laid down that as soon as an organised rebellion has reached such proportions as to involve demands upon third states which can only be supported upon the hypothesis that a state of war exists, the recognition of such a state becomes immediately legal.

This question was much discussed on the outbreak of the American Civil War in April, 1861. The belligerency of the Confederate States was recognised by Great Britain on the 14th of May, and the recognition was bitterly resented by the United States Government. It is not easy to understand the American contention, in view of the fact that on April 19 a blockade of the seven states had been declared by President Lincoln, involving an essentially warlike interference with the rights of neutral commerce. The course adopted by the British Government was the only proper course to be followed in the circumstances, and the leading maritime states acted similarly.

Revolution-  
ary hostili-  
ties.

In a series of prize decisions the true view was stated by the Supreme Court of the United States:<sup>1</sup> 'It is not the less a civil war with belligerent parties in hostile array, because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or state be acknowledged in order to constitute it a party belligerent in war, according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist, unless there be two belligerent parties. . . . As soon as the news of the attack on Fort Sumter, and the organisation of a Government by the seceding states, assuming to act as belligerents, could become known in Europe, to wit, on the 13th of May, 1861, the Queen of England issued her proclamation of neutrality "recognising hostilities as existing between the Government of the United States of America and *certain states* styling themselves the Confederate States of America." This was immediately followed

<sup>1</sup> *The Prize Cases* (1862), 2 Black, 665; Scott, *Cases*, p. 475, at p. 478.

by similar declarations or silent acquiescence by other nations.'

Furthermore, the President of the United States, in his annual message to Congress in 1869, observed: 'A nation is its own judge when to accord the rights of belligerency, either to a people struggling to free themselves from a government they believe to be oppressive, or to independent nations at war with each other.'<sup>1</sup>

<sup>1</sup> See *Parl. Papers, N. America*, 1872 (No. 2), p. 17.

## CHAPTER II

### QUALIFICATIONS OF LAWFUL BELLIGERENTS

UNDER earlier practice the civilian population of an invaded country was subject to the same kind of treatment as was applicable to the armed forces; the conduct of belligerents varied with the character and mood of commanders and with the discipline of the armies under them. Councils, theologians, philosophers and jurists frequently urged substantial relaxations; thus it was urged that ecclesiastics, merchants, farmers, shepherds and all peaceful inhabitants should be immune from attack, and that the women and children of even infidel countries should not be subjected to violence. In the Thirty Years' War the conduct of the belligerents was characterised by unmitigated ferocity; barbarities and wholesale slaughter were resorted to without compunction. The actual practice fell far behind the prevailing doctrines. But the theory of jurists in the end exerted a great influence on the progressive development of international practice. What with the teaching of writers like Grotius, barbarous excesses in warfare came to be repugnant to the conscience of men; and after standing armies were established and military organisation and discipline improved, various mitigations began to be introduced. Thus the distinction between the liabilities of armed forces and those of the non-combatant population was more regularly recognised; and by the beginning of the eighteenth century it had become a generally accepted principle that the civilian inhabitants of a belligerent country were to be immune from deliberate attack on the part of the enemy so long as they did not participate in the fighting. Next, thanks to the advocacy of writers, and notably to the persuasive eloquence of Rousseau, the doctrine spread that war is primarily a relation between Sovereigns and Governments, and not necessarily between their respective subjects in their private capacity.

This progressive doctrine was applied, more or less thoroughly, in the wars of the nineteenth century. Wellington refrained, in his various campaigns, from making direct war on non-combatants. In the American Civil War, McLellan and Lee were at pains to order their men to respect the persons,



property and honour of the civil population belonging to the enemy. In 1866 Prince Frederick Charles proclaimed, when he invaded Saxony, that his warlike operations were directed against the Government and not against the people at large. Similarly the King of Prussia made the following announcement, August, 1870, in the Franco-Prussian War: 'I make war against French soldiers, not against French citizens. The latter will therefore continue to enjoy security for their persons and property, so long as they themselves shall not, by hostile attempts against the German troops, deprive me of the right of affording them my protection.' Instructions of the same character were issued in the Chino-Japanese War, 1895, and in the Russo-Japanese War, 1904. And in the South African War, first General Buller and then Lord Roberts issued proclamations promising security to non-combatants if they refrained from participating in the military operations.<sup>1</sup>

In 1868 the Conference of military representatives of European powers and Brazil, who met at St. Petersburg, adopted a Declaration, wherein it was agreed that the only object of belligerent operations is to weaken the military forces of the enemy.

Four important international documents, subsequently established, provide a fairly complete code for the guidance of combatants in land warfare—the unratified Declaration of Brussels of 1874, the Second Convention of the Peace Conference of 1899, the Fourth Convention of the Peace Conference of 1907, and the Geneva Convention of 1906. The United States had led the way by drawing up a series of rules in 1863, which were adopted (except in so far as they dealt with the question of levies *en masse*) by Germany in 1870;<sup>2</sup> and the Conference of the powers at Brussels in 1874 drew up a Declaration in that year which was, however, never ratified, Great Britain and Germany in particular declining to accept it at the time, though it subsequently became the basis of the Conventions agreed upon at the Hague. But even in 1899 and 1907 there was no unanimity, chiefly owing to the difficulties arising on the question of the conditions under which combatants may be recognised and treated as belligerents, and the result was that the actual Regulations were set out as annexes to the Conventions, the contracting parties only agreeing to issue instructions to their forces in conformity with

The Hague  
rules.

<sup>1</sup> See J. M. Spaight, *War Rights on Land* (London, 1911), pp. 35 *seq.*, and the references there given.

<sup>2</sup> Pearce Higgins, *The Hague Peace Conferences*, p. 256; Hall, 7th ed. p. 552.

these Regulations, without expressly binding themselves to accept them in their entirety.<sup>1</sup>

They are 'general rules of conduct for belligerents in their relations with each other and with populations'; though it is to be noted that a certain binding force is recognised in them by the provision of the Convention of 1907 (which supersedes that of 1899<sup>2</sup>), that belligerent parties violating the Regulations shall make compensation 'if the case demands.' It must also be remembered that the mere absence of a specific prohibition is not to be taken as justifying any particular act or practice. In the preambles to both Conventions (1899 and 1907) it was laid down that 'it could not be intended by the High Contracting Parties that the cases not provided for should, for want of a written provision, be left to the arbitrary judgment of military commanders. Until a more complete code of the laws of war can be issued, the High Contracting Parties think it expedient to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established between civilised nations, from the laws of humanity, and the requirements of the public conscience.' The Convention has been signed, with occasional reservations, by all the powers except China, Spain and Nicaragua.

The Swiss Government summoned a Conference at Geneva in 1864, which drew up a code of rules relating to the treatment of the wounded, and those in charge of them, in land warfare. A second Conference in 1868 drew up further rules by way of addition and explanation, and applying the principles of 1864 to naval warfare. These, though generally acted upon, were never ratified. A more complete code became desirable, and at the Hague in 1899 it was left to the Swiss Government to summon a further Conference, which met in 1906 and drew up the code (dealing with land warfare) of that year; and the same principles were adapted to naval warfare at the Hague in 1899 (Convention III) and 1907 (Convention X).

Both within and without the regular armed forces of the belligerents it is of great importance to determine the limits of combatant character. The Declaration of Brussels and

Non-combatants with the armed forces.

<sup>1</sup> Convention II of 1899, Art. 1, and Convention IV of 1907, Art. 1, *Parl. Papers, Misc. No. 1* (1899), pp. 56-58. Convention IV of 1907 was ratified on behalf of Great Britain in November, 1909.

<sup>2</sup> Art. 4.

the Hague Conventions lay it down that 'the armed forces of the belligerent parties may consist of combatants and non-combatants.' Combatants are entitled to some privileges; non-combatants to others; and a belligerent is entitled to require securities that enemy individuals shall not be able to pass at pleasure from one class to the other. Non-combatants within the armed forces include chaplains, the medical and hospital staff<sup>1</sup> (including those exclusively engaged in the collection, transport and treatment of the wounded), the *personnel* of voluntary aid societies duly authorised and notified, all of whom are, by the Geneva Convention of 1906, not to be treated as prisoners of war, but are to be respected and protected in all circumstances, even though they are armed and use their arms in self-defence, or in defence of the sick and wounded. If captured by the enemy, they are to continue to carry on their duties under his direction (Art. 12), and to be sent home when their services are no longer indispensable, and they are (except in the case of voluntary aid societies) to be paid on the same basis as persons of the same rank employed by the enemy (Art. 13).

Other non-combatants with the army, such as commissariat employés, contractors, telegraphists and the like,<sup>2</sup> may be made prisoners of war if the enemy think fit to detain them, and have a right to be treated as such; and newspaper correspondents are included in this category, though they will probably only be detained for special reasons.<sup>3</sup>

Sailors, of whatever nationality, on board the enemy's merchant ships were till recently regarded as liable to capture as prisoners of war, on the ground of the assistance they might give in naval operations. The point was disputed by Germany in 1870 with no very good reason, but may now be regarded as settled by the Hague Convention (No. XI) of 1907, by which it was agreed<sup>4</sup> that on the capture of an enemy merchant ship, which is taking no part in the hostilities, neutral sailors cannot be made prisoners, nor neutral officers if they promise in writing not to serve on an enemy ship during the war, the promise being only required from the officers; while enemy officers and crew are to enjoy the same exemption on giving a written undertaking not to engage, for the like period, in any service connected with the operations of the war, whether on land or sea. This Convention

<sup>1</sup> Geneva Convention, 1906, Arts. 6, 9, 10, 11 *et seq.*

<sup>2</sup> Hall, 7th ed. p. 426. Hague Convention, 1907 (No. IV), Art. 13.

<sup>3</sup> Hall, p. 426*n.*

<sup>4</sup> Arts. 5, 6, 7 and 8 of Convention XI of 1907.



(No. XI of 1907) was ratified on behalf of Great Britain in November, 1909.

So far we have dealt with the right of non-combatants either to be treated as prisoners of war or be released. More difficult has been the settlement, if indeed it can be said to be yet settled, of the question of the right of combatants to be treated as prisoners of war, instead of being shot or otherwise punished, as violators of the rules which must be observed by belligerents. The Hague Conventions of 1899 and 1907 repeated Art. 9 of the Declaration of Brussels (1874) on this point:

Who are lawful combatants.

‘The laws, rights and duties of war are applicable not merely to armies, but also to militia and volunteer corps satisfying the following conditions:—

1. That of having at their head a person responsible for those under him.
2. That of wearing an irremovable and characteristic badge of a kind to be recognised at a distance.
3. That of openly carrying arms.
4. That of conforming in their operations to the laws and customs of war.’<sup>1</sup>

The more exacting claim has been sometimes made that combatants shall wear a uniform distinguishable at rifle range. The question arose in the Franco-Prussian War, in connection with the *francs-tireurs*, who took up arms on behalf of France. Germany refused to recognise them as combatants on the ground that they wore no badge irremovable and distinguishable at rifle range. The claim is reasonable that the badge shall be of such a kind that a man may not suddenly convert himself by its removal from a combatant to a peaceful farmer, but to demand a badge distinguishable at rifle range is, as Hall expresses it,<sup>2</sup> to require not merely a uniform but a conspicuous one. The tolerance at present conceded to guerilla troops is a bare one, and is less likely to be extended than curtailed. Thus a Prussian notice published at Vendresse in the Franco-Prussian War, declared that any person wearing plain clothes and fighting without Government authority would be liable to ten years’ imprisonment, or, in an aggravated case, to execution. Section 4, Art. 82 of the American

Guerilla troops.

<sup>1</sup> *Parl. Papers, Misc.* No. 1 (1899): ‘Règlement concernant les lois et coutumes de la guerre sur terre,’ sect. i, chap. i, art. 1. *Misc.* No. 6 (1908), p. 50 (Convention No. IV of 1907).

<sup>2</sup> 7th ed. p. 555.



instructions issued in 1863 contains the following provision upon this point:—

‘Men, or squads of men, who commit hostilities . . . without commission, without being part and portion of the organised hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.’

Levies *en masse*.

A somewhat similar class of question arises in the so-called levies *en masse* of an invaded population. Spontaneous risings of this kind on the part of the threatened population are as old as war itself, and no law can presume to abolish them any more than it can abolish the right of self-defence—a fundamental and inalienable right of all animate beings. Noteworthy examples of levies *en masse* occurred in Russia (1700) on the approach of Charles XII, in Prussia (1807) during the Napoleonic wars, in Spain (1808-1812), in Russia (1812), in Prussia (1813); and, coming nearer to our own time, in the Boer War, and also at Niou-tsia-toun in the Russo-Japanese War.

Both at the Brussels and Hague Conferences a conflict of opinion disclosed itself on this question between the larger and smaller continental powers. The former showed a disposition to exact a more stringent degree of conformity to the formalities of combatant character than the smaller powers held to be consistent with the desperate nature of the crisis. Art. 10 of the Declaration of Brussels was finally adopted with one alteration at the Hague in 1899 and 1907:—

‘The population of an unoccupied territory, which, on the approach of an enemy, takes up arms spontaneously to resist the invading force, without having had time to organise itself conformably to Art. 1,<sup>1</sup> will be treated as belligerent, if it carries arms openly<sup>2</sup> and respects the laws and customs of war.’

The British delegate, in 1899, was anxious to move an additional Article to this effect: ‘Nothing in this chapter shall be considered as tending to diminish or suppress the right which belongs to the population of an invaded country to patriotically oppose the most energetic resistance to their

<sup>1</sup> Already quoted on p. 199.

<sup>2</sup> These words were added in 1907.

invaders by every legitimate means.' <sup>1</sup> But M. de Martens substituted a somewhat vague pronouncement, which was received with acclamation, to the effect that 'unforeseen cases were not to be left to the arbitrary judgment of military commanders, but were to be placed under the safeguard of the law of nations, the law of humanity, and the requirements of the public conscience.'

It is clear that in the case of levies *en masse* it is not reasonable to require either a uniform or an explicit state authorisation. As to the uniform, Wellington wrote to Masséna in 1810, in reference to the Portuguese Ordenanza: 'Il paraît que vous exigez que ceux qui jouiront des droits de la guerre soient revêtus d'un uniforme; mais vous devez vous souvenir que vous-même avez augmenté la gloire de l'armée française en commandant des soldats qui n'avaient pas d'uniforme.' <sup>2</sup> On the question of authorisation, the provisions of Art. 1 of the Annexes to the Conventions of 1899 and 1907 must be considered as a disallowance of the German requisition made in 1871, that 'every prisoner, in order to be treated as a prisoner of war, shall prove that he is a French soldier, by showing that he has been called out and borne in the lists of a military organised corps, by an order emanating from the legal authority, and addressed to him personally.' The German official manual of the laws of war on land—*Kriegsbrauch im Landkriege* (issued in 1902 in accordance with the Hague requirements), demands, in the case of levies *en masse*, not only that arms should be carried openly and the laws and usages of war respected, but also that they should possess the additional qualifications necessary for the organised military forces. At the beginning of the Great War in 1914 the Germans, during their onslaught on Belgium, refused to admit the belligerent status of the Belgian Civic Guard and other combatants whose position and conduct were not incompatible with the existing rules of international law. Many of these combatants were illegitimately executed conformably to the far-fetched and presumptuous doctrine of *Kriegsverrath* ('war treason'). <sup>3</sup>

The legality of the introduction of coloured and semi-civilised troops <sup>4</sup> into a war between nations belonging to the white and civilised race depends on their compliance with the

Coloured and semi-civilised troops.

<sup>1</sup> *Parl. Papers, Misc. No. 1* (1899), p. 161.

<sup>2</sup> *Wellington Despatches*, vi, 464.

<sup>3</sup> Cf. Phillipson, *Int. Law and the Great War*, pp. 122 seq.

<sup>4</sup> See J. M. Spaight, *War Rights on Land* (London, 1911), pp. 65 seq.

requirements laid down for belligerent status. If it is certain or highly probable that semi-civilised or savage troops will not remain amenable to military discipline, and that they will get out of hand and act contrary to the recognised laws and usages of war, their employment is clearly unlawful. Still, there is neither certainty nor high probability that so-called civilised troops will always observe the provisions imposed by law and civilisation; for in the Great War there is abundant and irrefutable evidence that large numbers of invading Germans in Belgium and France deliberately committed excesses which surpassed in horror the worst deeds perpetrated by 'savage' and 'barbarian' troops in recent wars. Whatever, then, may be urged on grounds of policy against the employment of coloured soldiers, the practice is permissible under international law.

Naval  
combatant  
status.

The naval forces of maritime powers comprise two classes of vessels: first, fighting vessels ('vaisseaux de combat'), including battleships, cruisers, torpedo-boats, destroyers and submarines; and secondly, auxiliary vessels ('vaisseaux auxiliaires'), including transports, colliers, supply ships, repairing ships, dispatch boats, etc. At the Hague Conference, 1907, one of the British delegates brought forward a classification of this kind, and proposed that the auxiliary vessels should be recognised as possessing the same belligerent status as the duly commissioned fighting ships. To this plan objection was promptly made that it was inconsistent with the principles of 'unneutral service.' Though this distinction is not sanctioned by international law, it nevertheless exists as a fact. Generally, then, it may be said that all properly authorised vessels belonging to or temporarily acquired by the state are legitimate combatants.

Privateers.

Privateers are vessels belonging to private individuals, which formerly received a combatant licence from the Sovereign. The nature of the rights enjoyed by privateers over captured property was well stated by Marshall, C.J., in *The Dos Hermanos*:<sup>1</sup> 'It is the settled law of the United States that all captures made by non-commissioned captors are made for the Government; and since the provisions in the Prize Acts as to the distribution of prize proceeds are confined to public and private armed vessels cruising under a regular commission, the only claim which can be sustained by the captors in cases like the present must be in the nature of

<sup>1</sup> (1817), 2 Wheaton, 76.



salvage for bringing in and preserving the property.' The practice of privateering was adopted in the Napoleonic wars; and it was recognised generally that the whole system encouraged abuse and misconduct, so that in course of time public opinion turned against it. A notable departure was made in the case of the Crimean War, 1854, by Great Britain and France, who agreed to discontinue the issue of letters of marque to private owners. On the resumption of peace, the Declaration of Paris, 1856, was signed whereby privateering may no longer be practised by the signatory powers when at war with one another. The United States, Spain, Mexico, Venezuela, Bolivia and Uruguay did not assent to the prohibition, the power first named basing its refusal on the convenience of privateers to a state without a powerful navy, as long as the right of capturing private property on the seas survives: an amendment exempting private property from such capture having been rejected. In the American Civil War of 1861, the President was authorised by Congress to issue letters of marque, but he did not make use of the authority thus granted to him. The Confederates offered licences to foreign vessels, but they were not accepted, owing to the restrictive legislation of the maritime powers and the threat of the United States to treat privateers as pirates. In the Spanish-American War, 1898, the United States declared her intention to accept the Declaration of Paris; but Spain claimed the right to issue letters of marque, though she did not put the claim into practice. The United States acted thus in accordance with a definitely proclaimed policy, Spain without prejudice to her right to issue letters of marque if she so desired.<sup>1</sup> However, at the Hague Conference in 1907, both Spain and Mexico proclaimed their adhesion to the Declaration of Paris,<sup>2</sup> as Japan had done in 1886; so that privateering may be said to have been, in fact, abolished.

The Declaration of Paris may now be regarded as part of international law and as possessing binding force generally, though a few states have not yet formally signified their adhesion to it. In the Great War of 1914, proposals were made in certain quarters that the practice of privateering should be resumed for various reasons; but none of the belligerents paid any attention to such suggestions. Moreover, so far as Great Britain is concerned, in a case that came before the Prize Court<sup>3</sup> soon after the commencement of hostilities, the President

<sup>1</sup> Holland, *Letters on War and Neutrality*, p. 122.

<sup>2</sup> *Parl. Papers, Misc. No. 4* (1908), p. 48; *La Deuxième Conférence internationale de la paix*, t. i (*Actes et documents*), p. 234.

<sup>3</sup> *The Marie Glaeser* (1914), 1 P.C. 38, at p. 54.



Volunteer  
navies.

declared that the Court would deem the Declaration of Paris to be part of international law and to possess binding force.

Germany in 1870, and Russia in 1878, proposed to encourage 'volunteer navies,' which would have reintroduced, under a less offensive name, some of the characteristic evils of privateering. In the German case the vessels were to be under naval discipline and the officers and crew were to enter the navy temporarily, and wear its uniform; in the Russian case the vessels were to be under the command of naval officers and the crews subject to naval discipline. It is to be regretted that Great Britain, when appealed to by France on the earlier occasion, upheld a distinction between this system and privateering,<sup>1</sup> subtle enough to annihilate, if generally adopted, and unless accompanied by careful restrictions, the beneficial results of the Declaration of Paris. The Russian scheme was in fact carried out by the formation of a 'volunteer navy,' with a Government subsidy and under the command of naval officers; and in 1904, during the Russo-Japanese War, two vessels of this fleet, the *Peterburg* and *Smolensk*, passed through the Bosphorus and Suez Canal as merchant vessels, and in breach of a specific undertaking given officially to Turkey, made captures as war vessels in the Red Sea.<sup>2</sup> The seizure of the *Malacca*, of the Peninsular and Oriental Line, by the *Peterburg*, on the ground that she carried contraband, called forth a strong protest from Great Britain, which led to that vessel's immediate release, and an agreement by Russia to restore all vessels captured by the two alleged cruisers. Their passage through the Bosphorus was in itself a breach of the Treaties of Paris, 1856, London, 1871, and Berlin, 1878, which was aggravated by their assumption of a false character; and the case, while raising the whole question of the permissibility of 'volunteer navies,' also raised the question of the conversion of merchant vessels into ships of war, which engaged the attention of the delegates to the Second Peace Conference of 1907 and the Conference of London in 1908.<sup>3</sup> The most important point of all—whether the conversion can take place on the high seas—was left, as we shall see, undecided; but that merchant vessels can be used as war vessels is generally admitted, and rules regulating such use were agreed upon at the Hague in 1907.<sup>4</sup> Great Britain, France and the United

<sup>1</sup> *Parl. Papers, Franco-German War*, No. 1 (1871), p. 22.

<sup>2</sup> Hall, 7th ed. pp. 562, 563; Pearce Higgins, *The Hague Peace Conferences*, p. 314.

<sup>3</sup> See *infra*, p. 205.

<sup>4</sup> See p. 206, *infra*.

States<sup>1</sup> all have arrangements with mail-steamship companies, whereby the companies' vessels are at the disposal of the Government on the outbreak of war, and it is conceived that no doubt can arise, if such vessels are under complete Government control as units of the regular navy and are not employed for the purpose of private gain. The employment of the *Peterburg* and *Smolensk* may, so far as this aspect of the case is concerned, have been defensible, as they were the property of a patriotic association, presumably not intent upon private gain, were under the command of a duly commissioned officer, and were manned by crews under naval discipline; and it may have been Russia's misfortune rather than her fault that they did not operate with her regular fleet, and got so far out of hand that the services of British cruisers were called in in order to convey to them the order to desist.<sup>2</sup> But in all the circumstances, it is by no means clear that they were not privateers within the meaning of the Declaration of Paris.

The chief question on which the Hague Conference of 1907, and after it the London Naval Conference<sup>3</sup> of 1908-9, found themselves unable to come to any agreement, was that of the conversion of merchant vessels into war vessels upon the high seas. It is of course an essential condition of the right of any belligerent vessel to interfere in any way with any neutral, that it must be an authorised and properly commissioned public ship of war. If a state is able to send out what is to all appearances a merchant vessel, and to turn her into a warship during her voyage, a dangerous facility is given to her master to seize enemy or neutral ships without warning; and she will, while ostensibly a merchant vessel, enjoy the advantage of coaling, provisioning and taking refuge in neutral ports, which as a warship she could not claim. In fact her position is analogous to that of a person who is not a recognised combatant in land war.

British case law throws no light upon this question and there has been no uniformity of national practice. A private vessel could, till privateering was abolished by the Declaration of Paris, lawfully seize enemy property, but might be treated as a pirate if she attacked the property of neutrals. The granting of commissions or letters of marque to private

Conversion of merchant vessels into war vessels on the high seas.

<sup>1</sup> Pearce Higgins, *The Hague Peace Conferences*, p. 314.

<sup>2</sup> Smith and Sibley, *International Law as Interpreted during the Russo-Japanese War*, 2nd ed. p. 46.

<sup>3</sup> See *infra*, p. 330.

ships was an attempt to legalise the operations of such vessels which, in spite of protests, was generally recognised as effective; and the complete conversion of a private vessel into a war vessel could not in principle be made the subject of objection. The whole question was raised in an acute form in 1904 by the exploits of the *Peterburg* and *Smolensk*, to which reference has already been made; and the Second Peace Conference in 1907 dealt to some extent with the question in Convention VII,<sup>1</sup> in which it was agreed that a vessel so converted must be under the direct authority, immediate control and responsibility of the power to which it belongs,<sup>2</sup> must bear the external marks which distinguish a warship of its nationality,<sup>3</sup> must be in command of a person in the state service, duly commissioned, and figuring in the list of officers of the fleet,<sup>4</sup> must be manned by a crew subject to military discipline<sup>5</sup> and must observe the laws and customs of war;<sup>6</sup> and that a belligerent must announce such conversion as soon as possible in the list of its warships.<sup>7</sup> These regulations were framed to control the capricious exercise of the right of conversion, and they establish a sufficiently clear distinction between the vessel which complies with them and the privateer as generally understood; but it was found impossible to come to any agreement that a vessel may not be so converted on the high seas.

In the memoranda drawn up by the powers represented at the Conference of London,<sup>8</sup> the difference of opinion was marked. There was no material on which there could be framed any proposition based on recognised rules. The British Government could only rely on the general principle that 'any further limitation to the security of peaceful commerce or of the freedom of neutral vessels to navigate the seas is opposed to the general interests of nations, while the exercise of belligerent force against neutrals in the manner indicated . . . would almost inevitably lead to friction, with the attendant danger of bringing other nations into the arena of war;' and on this they urged 'that units of the fighting force of a belligerent should not be created except within the jurisdiction of that power.' In default of agreement on this, it was suggested that, by way of compromise, the right of conversion on the high seas should be restricted to vessels specifically and

<sup>1</sup> Cd. 1175, p. 74. This Convention was ratified by Great Britain in November, 1909.

<sup>2</sup> Art. 1.

<sup>3</sup> Art. 2.

<sup>4</sup> Art. 3.

<sup>5</sup> Art. 4.

<sup>6</sup> Art. 5.

<sup>7</sup> Art. 6.

<sup>8</sup> *Parl. Papers, Misc.* No. 5 (1909), Cd. 4555, pp. 108-111.



publicly designated in advance as suitable for the purpose, and entered on the navy lists; and that such vessels should be subjected while in neutral ports to the same treatment as war-ships. The United States, Japan, the Netherlands and Spain supported the British contention; France and Russia claimed the unfettered right of conversion; Germany, while claiming the right, suggested as a restriction that there should be no reconversion during the war; Italy, while supporting the British view, tried to effect a compromise; and Austria-Hungary in an argumentative memorandum suggested that there should be some restrictions, the prohibition, for instance, of reconversion and the insistence upon a special armament and speed, and upon special notification. The discussion took much the same form in 1909 as in 1907; the claim to an unrestricted right was firmly maintained, and the question was of necessity left entirely open.

A distinction is to be drawn between converted merchantmen, which may participate in all the lawful operations of warfare, and defensively-armed merchantmen,<sup>1</sup> which are not commissioned vessels and may not engage in hostilities except in case of self-defence.<sup>2</sup> The British practice of arming merchant ships for defensive purposes dates from the time of Charles I. During the Napoleonic wars the merchantmen of belligerents and neutrals alike carried guns, and their right to defend themselves in case of attack was recognised by the British, French and American Prize Courts.<sup>3</sup> The trading vessels of the East India Company and of the Hudson Bay Company carried armament, and in the middle of the nineteenth century ships engaged in the opium trade similarly protected themselves. The practice then seems to have fallen into disuse, but was revived quite recently, and notably by Great Britain, whose announcement was made in 1913.

Defensively-armed merchantmen.

Objection was taken, however, in some countries, especially in Germany, where it was held that such measures of self-

<sup>1</sup> See A. Pearce Higgins, *Defensively-armed Merchant Ships and Submarine Warfare* (London, 1917); and the same author's *Armed Merchant Ships*, in *Amer. Journ. of Int. Law*, vol. viii (1914), pp. 705 seq.

<sup>2</sup> The Order in Council of March 2, 1915, awards prize bounty for the destruction of 'armed ships' of the enemy; and the Prize Court has decided that this expression refers only to a fighting unit of the fleet, *i.e.* a ship commissioned and armed for offensive action in naval warfare: *H.M. Submarine E. 14* (1917), 2 P.C. 404.

<sup>3</sup> Cf. *Several Dutch Schuyts* (1805), 6 C. Rob. 48; *Le Pigou* (or *Pégou*) (1800), *Pistoye et Duverdy, Prises Maritimes*, vol. ii, p. 51; *The Nereide* (1815), 9 Cranch, 388.



defence were illegal and rendered the crew liable to be treated as 'criminals.' But the German Prize Regulations, August 3, 1914, whilst impliedly recognising the arming for self-defence, left the position ambiguous: '(1) The exercise of the right of visit, search and capture, as well as every attack on the part of an armed merchant ship upon a German or neutral merchant ship is considered an act of piracy. . . .' (2) 'If an armed merchant vessel offers armed resistance against measures taken under the law of prize,' the enemy Government is liable for damage and injury, the crew are to be treated as prisoners of war, and the passengers are to be set free, unless they have shared in the resistance, when they become liable to the penalties of martial law. Here, Art. (1) does not discriminate between an unprovoked attack and an attack in self-defence. However this may be, many states have formally recognised the legality of arming merchant ships as a defensive measure.<sup>1</sup> Such vessels have not the status of combatants, and so must not exercise the rights of warships, and, reciprocally, may not be treated as combatants. They are not privateers, in that they have not received letters of marque or other licence to participate in offensive operations; they are not pirates, in that they do not commit unprovoked acts of violence or acts of depredation *animo furandi* or *lucri causa*. But if an armed merchantman offers resistance to capture and engages the enemy warship, she places herself *ipso facto* in the position of a combatant and becomes liable to the treatment of a combatant.

<sup>1</sup> See A. Pearce Higgins, *op. cit.* pp. 16 *seq.*

## CHAPTER III

### HOSTILITIES—LIMITS OF PERMISSIBLE VIOLENCE

NOT every mode or instrument of violence is permitted by the laws of war. The general principle must always be observed that only such violence is permissible as is reasonably proportionate to the object to be attained, namely, the breaking down of the armed resistance of the enemy. The preamble of the Declaration of St. Petersburg in 1868 recognised 'that the only legitimate end which states should aim at in war is the weakening of the military forces of the enemy, and to this end it is sufficient to put out of action the largest possible number of men; and that this end would be exceeded by the use of arms which would uselessly aggravate the sufferings of men put out of action, or would render their death inevitable.'

Funda-  
mental  
principle.

The rules on this point, as at present agreed in principle, are set out in Arts. 22 to 28 of the Annex to Convention IV of 1907, which expanded and amended the provisions of the Declaration of Brussels and of the Convention of 1899, and was ratified on behalf of Great Britain in November, 1909. After laying it down that the choice of means of injuring the enemy is not unlimited,<sup>1</sup> the rules particularly forbid the following acts: <sup>2</sup>—

Specific  
prohibitions.

- (a) The use of poison or poisoned weapons.
- (b) The treacherous killing or wounding of individuals belonging to the enemy nation or army.
- (c) The killing or wounding of an enemy who has surrendered at discretion, having thrown down his arms, or possessing no longer the means of defending himself.
- (d) The declaration that no quarter will be given.
- (e) The use of arms, projectiles or substances likely to cause unnecessary suffering.
- (f) The abuse of flags of truce, of the national flag, or of military badges and uniforms belonging to the enemy, as well as of the badges peculiar to the Geneva Convention.

<sup>1</sup> Art. 22.

<sup>2</sup> Art. 23.

- (g) Any destruction or seizure of enemy property not imperatively called for by military necessities.
- (h) The declaration that rights, and rights of action, of nationals of the enemy are extinguished, suspended or unenforceable in courts of law.
- (i) The forcing by a belligerent of the nationals of the enemy to take part in operations of war directed against their country, even in cases where they may have been in his (the belligerent's) service before the outbreak of the war.

Further, it was laid down by Art. 44 that a belligerent might not compel the population of occupied territory to give information about the army of the other belligerent or his means of defence; though in Art. 24, which expressly recognised 'ruses of war' as legitimate, it was also declared permissible to use the means necessary to obtain information about the enemy and the country, and Art. 52 provided that neither requisitions in kind nor services could be demanded from communes or inhabitants 'except for the needs of the army of occupation,' and then only in proportion to the resources of the country, and of such a nature as not to imply for the population the necessity of taking part in operations of war against their country.

Of the above provisions (a) to (g) were a repetition of the rules of the Brussels Conference and the Convention of 1899; and the prohibitions contained in special Conventions (*e.g.* the Declaration of St. Petersburg of 1868, which forbade the use of any projectile of a weight below 400 grammes [about 14 oz.], which is either explosive or charged with fulminating or inflammatory matter) were incorporated by reference. Rule (h), however, and Art. 44 represent important innovations.

Military  
necessity.

It is obvious, then, that the instruments and methods permissible in war are limited; and the plea of 'military necessity' may not override them. Occasionally military necessity is mentioned in the Hague Rules, but only by way of exception—for these very rules were laid down to prevent a belligerent from having recourse at discretion to such a plea and from indulging in unrestrained conduct. The private instructions of a Government to its armed forces must conform to the object and spirit of these rules. The German Official Manual, however, set up 'military necessity' as the sole governing factor in the operations of war, to which all established relaxations and all principles dictated by humanity

and fairness are subservient. The aim appears to be to make war so violent, so ferocious, and so 'frightful,' that the forces inspired by such a doctrine may be enabled to terrify and quickly overcome their enemy. Accordingly the Manual directs the German armies to do all in their power to annihilate the adversary—not only to crush his physical power, but also to demolish his property and destroy his intellectual and moral resources, and so to effect his complete demoralisation. Officers are warned against the humanitarian tendencies of the time. Further, German writers are fond of drawing a distinction between what they call 'Kriegsmanier,' the custom or usage of war admitting mitigations, and 'Kriegsraison,' the necessity of war which overlooks all limitations that might interfere with the successful prosecution of military operations; and they are attached to the maxim, 'Kriegsraison geht vor Kriegsmanier' (necessity of war overrides usage of war); that is, as soon as an alleged case of necessity arises, the laws of war deliberately established for the purpose of imposing limitations on licence and fury lose their binding force. Views of this kind are so obviously contrary to international law and morality that they do not need elaborate refutation here. Suffice it to say that their application in the Great War aroused the indignation of the civilised world.<sup>1</sup>

The rule against the restriction of rights of action was proposed by Germany<sup>2</sup> as an extension of the inviolability of enemy property to incorporeal property, and it was unanimously adopted; but it is not at all certain what it means. Germany appears to understand it as a complete reversal of the hitherto established principle that the outbreak of war results in the extinction or suspension of all rights of action between the belligerent states<sup>3</sup> and their respective subjects. This is the meaning which the words, on the face of them, bear; but it is remarkable that so startling an innovation in the law of international obligations should be thus found sandwiched in the middle of a series of instructions to commanders in the field. Professor Holland,<sup>4</sup> with good reason, doubts whether, in spite of the ratification of the Convention

Rights of  
action.

<sup>1</sup> See Phillipson, *Int. Law and the Great War*, pp. 133 seq. On 'Kriegsraison' and 'Kriegsmanier,' see Westlake, *Collected Papers*, pp. 243, 244. For an examination of the extravagant views contained in the German Manual, see an article by A. Merignhac, in *Revue générale de droit int. pub.*, vol. xiv (1907), pp. 197 seq.; J. H. Morgan, Introduction to his trans. of the *Kriegsbrauch im Landkriege*, entitled *The German War Book* (London, 1915).

<sup>2</sup> Pearce Higgins, p. 263.

<sup>3</sup> See p. 182, *supra*.

<sup>4</sup> *The Laws of War on Land*, p. 44.



(which, as we have already pointed out, did not bind the signatories to accept specifically each of the Articles, but only to issue instructions in conformity with them to their armed forces), this rule can be taken to have made this substantial alteration in the law; and in the courts of Great Britain, at any rate, it probably could not be carried into effect without municipal legislation.

The alternative interpretation of the rule treats it merely as an instruction to an invading commander that he is not to refuse redress to enemy subjects when they bring well-founded complaints against the conduct of his troops, and an instruction to the invading state that it is not, in any courts it may set up in the occupied territory, to disregard, in favour of its own subjects, the rights of enemy subjects. Read in this way the rule is more in harmony with those which it accompanies; but such an interpretation narrows down the application of the words in a way which can only be justified by a general reference to the subject-matter of the whole Article. International documents are, it is true, construed with a freedom from technical rules which the judges in a British court do not enjoy; but this seems an extreme case of disregard of the primary meaning of words—unless it be a case (as it probably is) of extremely careless and defective drafting.

Of these alternative interpretations the more reasonable one, having regard to the context, is the second mentioned above. In view of the long-established rule of English common law relative to the interdiction of commercial relationships with the enemy, the British delegates at the Hague could not possibly have accepted the first interpretation, which seems to have been adopted on the continent. The Foreign Office has more than once (*e.g.* in 1911) declared that the said Art. 23 (*h*) appertains only to the obligations of an invading state; and this view was also adopted in the United States.<sup>1</sup> The question came before the Court of Appeal in 1915, which likewise held that the provision refers only to the conduct of a commander in the field and in occupied territory.<sup>2</sup>

Compulsion  
applied to  
population.

The provisions with regard to the compulsion which may be applied to an invaded population also leave room for doubt, and were only arrived at after much difference of opinion. Art. 36 of the Declaration of Brussels only prohibited com-

<sup>1</sup> See *Amer. Journ. of Int. Law*, vol. ii (1908), p. 70.

<sup>2</sup> *Porter v. Freudenberg, etc.* [1915], 1 K.B. 857; 31 T.L.R. 162.

pulsion on the population to take part in military operations against its own country, and this provision was repeated in the Convention of 1899 (Art. 44). In 1907, the discussion centred round the forced employment of the inhabitants as guides.<sup>1</sup> Austria and Russia insisted that such an operation was permissible, but met with strong opposition from France, Belgium, Holland and Switzerland. The ultimate decision was to forbid such employment, but the Convention was only signed by Germany, Austria, Japan and Russia subject to a reservation as to Art. 44.

The general effect of the provisions on this point may be stated thus:—The means may be employed which are necessary to obtain information about the enemy and the country (Art. 24); but among such means must not be included the compulsion of enemy subjects to take part in operations of war directed against their country (Art. 23); and the furnishing of information about the army of the other belligerent or his means of defence is to be regarded as 'taking part in an operation of war' for this purpose (Art. 44). Subject to this restriction, forced services may be demanded from the inhabitants, if they are necessary for the army of occupation (Art. 52).

Germany objected to Art. 44, on the ground that it was unnecessary to specify a particular kind of 'operation of war,' which was sufficiently covered by the more general terms of Art. 23. That the other dissentient powers recognised that Art. 23 did include the forced employment of guides among the prohibited operations seems clear by the Austrian attempt to restrict that clause to a prohibition against compelling the inhabitants to take part in the operations of war 'as combatants'; and by assenting to that Article without the addition of these two words they may, strictly speaking, be taken to have acquiesced in the principle that such forced employment of guides is not permissible.

The practice of sieges and bombardments is regulated as follows:—

Towns, villages, dwelling-houses and buildings may neither be attacked nor bombarded by any means whatever, unless they are defended.<sup>2</sup> The words 'by any means whatever' were added in 1907, to cover the case of bombardment from balloons. The whole question of balloon attacks was fully discussed in 1899, when a Declaration<sup>3</sup> was adopted (but only

Sieges and  
bombard-  
ments.

<sup>1</sup> Pearce Higgins, pp. 265 seq.

<sup>2</sup> Art. 25.

<sup>3</sup> Declaration I of 1899.

for a period of five years, which expired in 1905) prohibiting the discharge of projectiles or explosives from balloons, or by other new and analogous methods. In 1907 the question was raised again. It was now clear that balloons in warfare for purposes other than reconnoitring were a practical possibility. The Declaration<sup>1</sup> was renewed, but only for a period extending to the termination of the Third Peace Conference; it was ratified by Great Britain in November, 1909, but as Germany, France, Italy, Russia, Spain and Japan have all refused to sign it, it is obviously of little, if any, value. It was only on the prohibition of such a method of attack on undefended towns that it was possible to arrive at unanimity. With the developments of aerial navigation in the last few years, it has become fairly clear that no power is likely to bind itself not to take advantage of the new science to the full, except with the limitation above stated. In any case, to drop bombs indiscriminately and without warning—as the Germans did during the Great War—in the streets and on private houses, hospitals and churches, for the purpose of terrorising the population and not for a military object, is contrary to the universally recognised principles of the law of war.

The officer in command of attacking troops, before beginning to bombard, except in cases of assault, should do all that he can to warn the authorities.<sup>2</sup>

In sieges and bombardments everything possible should be done to spare buildings devoted to worship, art, science and charity, historic monuments,<sup>3</sup> hospitals and the resorts of the sick and wounded, so long as they are not used at the same time for military purposes.<sup>4</sup>

The besieged should indicate such buildings beforehand to the besieger by conspicuous and distinctive marks.<sup>5</sup>

A town even when taken by storm may not be handed over to pillagers.<sup>6</sup>

The conduct of the German armies in the war of 1914 was not in accordance with the above provisions. It is not the purpose of this brief work to examine the numerous signal violations of the law of land warfare committed by them, nor to recount their savage exploits in Belgium and Northern France, *e.g.* the deliberate bombardment and destruction of undefended towns and buildings, including churches, libraries, buildings devoted to science, art and philanthropic objects. With regard to the burning of Louvain, the Prime Minister

<sup>1</sup> Declaration XIV of 1907.

<sup>4</sup> Art. 27.

<sup>2</sup> Art. 26.

<sup>5</sup> Added in 1907.

<sup>3</sup> Added in 1907.

<sup>6</sup> Art. 28.



did not employ exaggerated expressions when he characterised the act as 'the greatest crime committed against civilisation and culture since the Thirty Years' War—a shameless holocaust of irreparable treasures lit up by blind barbarian vengeance.'<sup>1</sup>

A controversy of much gravity was raised some time ago as to the propriety of holding to ransom and, failing payment, of bombarding the undefended coast towns of an enemy. The provisions as to bombardment already quoted relate, it must be noted, only to operations on land. In an article,<sup>2</sup> which became sufficiently notorious to attract the diplomatic attention of the British Government, M. le Contre-amiral Aube advocated a maritime policy for his own country which suggested alarming possibilities for the future. His argument had the merit of simplicity. War may be defined as the appeal of right against violence denying that right; it follows that the paramount aim of war is to injure the enemy in every possible way. The nerves of war are wealth; consequently everything which strikes at the enemy's wealth, and still more at the sources of that wealth, becomes not merely legitimate, but obligatory. So we must expect in the future to see armed squadrons turn their powers of attack and destruction against coast towns, whether or not they be fortified, whether or not they be defended; they will burn them, destroy them, or at least hold them mercilessly to ransom.

Bombardment of coast towns.

Hall<sup>3</sup> adds the significant facts that Admiral Aube was appointed Minister of Marine soon after the publication of this article, that he gave orders for a class of vessels specially suited to carry out the designs recommended in it, and that in 1878 the Russian fleet at Vladivostock was about to sail for Australia, with the intention of holding the undefended coast towns to ransom. Further, during the British naval manœuvres of 1888 the attacking fleet purported to bombard, and to levy contributions upon, various places along the coast; and though Professor Holland protested strongly in *The Times*,<sup>4</sup> a considerable body of high naval authority took up the position that such a proceeding was perfectly justified, and a committee of admirals reported in its favour in 1889. The reasons given, apart from the frank anarchy of one officer, who stated that 'the talk about international law is all

<sup>1</sup> *The Times*, Sept. 5, 1914. For fuller details, see Phillipson, *Int. Law and the Great War*, chaps. ix, x; and the various official publications.

<sup>2</sup> *Revue des Deux Mondes*, 1882, pp. 314-346.

<sup>3</sup> 7th ed. p. 454.

<sup>4</sup> *Letters to 'The Times' upon War and Neutrality*, pp. 73 seq.



nonsense,' seemed to be chiefly based on the feeling that other nations would adopt every possible means in war of weakening Great Britain, and that the bombardment of coast towns would be the most efficacious method to be found. If this was the fear, it was hardly wise for Great Britain to provide other nations with a valuable precedent to be used against her. Wellington in 1844 had described such a method of warfare as 'disclaimed by the civilised portions of mankind.'<sup>1</sup> It is contended<sup>2</sup> that the bombardment of places occupied by non-combatants is on the same level of illegality as devastation, that it is proposed to 'introduce for the first time into modern maritime hostilities a practice which has been abandoned as brutal in hostilities on land,' and that the analogy of contributions on land affords no sort of justification for the enforcement of ransom by a hostile squadron. Such contributions 'are a totally different matter from demanding a sum of money or negotiable promises to pay, under penalty of destruction, from a place in which [the belligerent] is not, which he probably dare not enter, which he cannot hold even temporarily, and where consequently he is unable to seize and carry away.'

It may at once be admitted that the practice of bombarding undefended towns would be the occasion of much suffering to persons upon whom the incidence of belligerent pressure has been generally deemed illegitimate; nor can it be denied that a very grave accession to the inhumanities of war would be involved in its recognition. It may also be properly pointed out that before acts of this kind are done, states are likely to reflect that reprisals may be made, and that reprisals need not be confined to acts identical with those which have called them forth. Such arguments are indeed likely to be more effective than others based upon the attribution to non-combatant property of an absolute right to immunity from capture or destruction. The contention that such property is immune is equally destructive of the claim to capture or destroy enemy private property on board enemy merchant vessels. Admiral Aube points out that in the American Civil War Confederate cruisers destroyed in a single month<sup>3</sup> 239 American vessels with an aggregate tonnage of 104,000, and value of 15,000,000 dollars. In cases where resistance was offered, it is reasonable to imagine that 'devastation and the slaughter of non-combatants' were not wanting to reinforce the persuasiveness of

<sup>1</sup> *Letters to 'The Times' upon War and Neutrality*. p. 79.

<sup>2</sup> Hall, 7th ed. pp. 455-457.

<sup>3</sup> May, 1864.

the summons to lie-to. Illustrations of this kind bring into curious relief the artificiality of much international practice. The most effective mode in which to meet Admiral Aube's suggestions is surely to say simply that the mode of belligerency advocated has never been practised or sanctioned (until the Germans adopted it in the Great War), that it is strikingly inhumane, and would afford good ground for serious reprisals.

It is hardly convincing to distinguish between the ransom which Admiral Aube recommends, and the contributions which are undoubtedly legal in land warfare, on the ground that 'ability to seize, and the further ability, which is also consequent upon actual presence in a place, to take hostages for securing payment, are indissolubly mixed up with the right to levy contributions.'<sup>1</sup> Hall is driven to admit that contributions may be exacted by a squadron which is prepared to enforce payment by landing a force; in other words, a ransom may be extorted at the barrel of a revolver which is denied to the cannon. 'A levy of money,' he continues,<sup>2</sup> 'made in any other manner than this is not properly a contribution at all. It is a ransom from destruction. If it is permissible, it is permissible because there is a right to devastate, and because ransom is a mitigation of that right.' Might it not be argued with equal force that a contribution is a ransom from destruction? Certainly destruction would follow sharply, where an attempt to resist the levying of a contribution coincided with ability to pay it. Similarly it might be argued that if contributions are permissible, they are permissible because there is a right to destroy. The answer is that there may in the abstract exist the right to destroy upon refusal to pay the contribution, without there existing an absolute right to destroy, of which contribution or ransom is a mitigation. But, however unconvincing it may be from the logical point of view, this distinction between ransom and contribution has been incorporated in the agreement which has ultimately been reached on the subject. The Hague Conference of 1899 did nothing but express a 'wish' that the whole question be referred to a subsequent conference. The United States in her Naval War Code of 1900<sup>3</sup> prohibited the bombardment of unfortified and undefended places, 'except when such bombardment is incidental to the destruction of military or naval establishments, public depots of munitions of war, or vessels of war in ports, or unless reasonable requisitions for provisions

Ransom and  
contribu-  
tions.

<sup>1</sup> Hall, p. 457.

<sup>2</sup> *Ibid.*

<sup>3</sup> See Pearce Higgins, p. 353.

and supplies essential at the same time to such naval vessel or vessels are forcibly withheld, in which case due notice of bombardment shall be given'; and bombardment for non-payment of ransom is specifically forbidden.

Undefended  
places.

In 1907, at the Hague, a substantial agreement was arrived at between the great majority of the powers represented, and was embodied in Convention IX. The bombardment by naval forces of undefended ports, towns, villages or buildings was forbidden;<sup>1</sup> but this general prohibition was very materially qualified by exceptions. In the first place, there was no unanimity on the point as to what is meant by 'undefended.' Are floating mines a 'defence'? On the face of it the answer would seem to be in the affirmative, a view which was taken by Great Britain, France, Germany, Japan and Spain,<sup>2</sup> all of which powers declined to agree to a clause which was inserted to the effect that the mere fact of automatic submarine contact mines being anchored off the harbour shall not be a justification for bombardment.<sup>3</sup> If a belligerent refrains from bombarding, he is entitled to immunity from danger, so far as the port or place which he so respects is concerned; even as in land warfare he does not kill or capture the civil population because, and only so long as, they are harmless. But it is obvious that nice questions may arise whose decision can only be left to the discretion of the belligerent commander. It will often be difficult to say exactly what place is protected by mines, for mines laid for the protection of a naval base may cover an area which includes several innocent coast towns. The objection to the clause referred to above will probably not be taken as involving a claim to direct a fire upon the residential parts of Southampton, or upon the Isle of Wight, merely because a line of mines at sea is laid for the defence of Portsmouth. The question is one which can only be decided upon the circumstances of each case; and it can only be hoped that the belligerent in such a case will bear in mind and apply by analogy the rule which directs him in bombarding military works and establishments which are part of a town, to do as little harm as possible to the rest of the town.<sup>4</sup> But it certainly seems not unreasonable to reserve power to bombard a purely civilian town which, having all the appearance of harmlessness, is nevertheless surrounded with mines; and this reservation will have done good if it produces greater caution in the use of such mines, which were proved in the

<sup>1</sup> Art. 1.

<sup>3</sup> Art. 1.

<sup>2</sup> See Pearce Higgins, p. 354.

<sup>4</sup> Art. 2.



Russo-Japanese War, and more particularly in the Great War, to involve great danger to neutral shipping. The whole question of their use formed the subject, as we shall see, of a Convention in 1907.<sup>1</sup>

The prohibition against bombardment does not, of course, apply to military works, military or naval establishments, depots of arms or material of war, workshops or plant, suitable for use for the needs of the fleet or army, and ships of war in the port. Such things may be destroyed after a summons to the local authorities and a reasonable interval giving an opportunity to the local authorities to destroy them themselves; and if there is no time for such summons and delay, care must be taken to do as little injury as possible to the town, though the belligerent is not to be held responsible for unavoidable damage done in the course of a permissible bombardment of this kind.<sup>2</sup> The word 'plant' ('installations') was used as being sufficiently vague to cover railway depots, floating docks, coal depots and other things reasonably likely to be of use in war.<sup>3</sup>

A further and most important exception was made, which embodies the distinction already referred to between 'ransom' and 'requisitions.' After due notice a belligerent may bombard undefended ports, etc., if, after summons, the local authorities decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force before the place in question. Such requisitions are to be proportionate to the resources of the place, shall only be demanded in the name of the commander of the naval force, and shall as far as possible be paid for in ready money; and if that is not possible, receipts are to be given;<sup>4</sup> but bombardment merely on account of the refusal to pay money contributions is forbidden.<sup>5</sup> The word 'ransom' was not used, lest it should lead to an inference that in principle the exaction of ransom was permissible.<sup>6</sup>

These provisions, again, are necessarily vague, and can hardly be regarded as anything more than an expression of a hope that a belligerent commander will do his best to comply with them. He cannot ascertain, save in the most rough-and-ready way, what are the resources of the place, and he alone can be the judge of what supplies are necessary for the immediate use of his force; but the inculcation of the rule that he cannot demand money contributions, and that he can only

<sup>1</sup> See p. 222, *infra*.

<sup>4</sup> Art. 3.

<sup>2</sup> Art. 2.

<sup>5</sup> Art. 4.

<sup>3</sup> Pearce Higgins, p. 355.

<sup>6</sup> Pearce Higgins, p. 356.



demand supplies for that portion of the fleet which is before the place in question, may not unreasonably be expected to exercise a restraining influence.

Protected  
buildings.

The Convention concludes with provisions similar to those laid down for land warfare, for the protection in all bombardments of buildings devoted to public worship, art, science or charitable purposes, historic monuments and hospitals (all of which are to be indicated by a special sign), for due warning, where military exigencies permit of such warning, and for the prevention of pillage.<sup>1</sup>

Expanding  
and ex-  
plosive  
bullets.

The permissibility of the use of the dum-dum bullet (mark IV pattern), which has a small cylindrical cavity in the head, over which the hard metal envelope is turned down, was much discussed at the Hague in 1899. Explosive bullets have been discontinued since the Declaration of St. Petersburg, 1868; but the representatives of Great Britain in 1899 refused to concur in an agreement which would have required all bullets to be cased in hard envelopes. The Conference drew up a Declaration<sup>2</sup> in favour of abstention from the use of bullets 'which expand or flatten easily in the human body, such as bullets with a hard envelope, which does not entirely cover the case, or is pierced with incisions.' But Lord Lansdowne instructed Sir Julian Pauncefote to inform the Conference that the Chitral campaign of 1895 had demonstrated the insufficiency of a hard envelope for stopping a rush in savage warfare. On this ground, and contending that the dum-dum bullet did not inflict unnecessary suffering, the British Government (and with them the United States) refused to sign this Declaration; but the objection was, so far as Great Britain was concerned, based only on the argument from savage warfare, as the bullet was not used by that country in the Boer War, and its use occasionally by the Boers formed the subject of strong protests. However, in 1907, Great Britain and Portugal intimated their accession to the Declaration, and of the larger powers only the United States has not yet assented to it,<sup>3</sup> though she was willing to agree to the prohibition of bullets inflicting unnecessarily cruel wounds, or exceeding the limit necessary for placing a man *hors de combat*.<sup>4</sup>

The Conference of 1899 also adopted a Declaration<sup>5</sup>

<sup>1</sup> Arts. 5, 6, 7.

<sup>2</sup> Declaration III of 1899.

<sup>3</sup> Pearce Higgins, p. 496.

<sup>4</sup> See *Amer. Journ. of Int. Law*, vol. ii (1908), p. 77.

<sup>5</sup> Declaration II of 1899.

against the use of projectiles which have for their sole object the diffusing of asphyxiating or deleterious gases. Here, again, Great Britain withheld assent (only because the Conference was not unanimous), but acceded to the Declaration in 1907; while the United States is still dissentient on the ground that enough is not yet known as to the effect of such projectiles for it to be possible to decide whether they are more or less humane than other methods of warfare. In several wars in the latter half of the nineteenth century, *e.g.* the Crimean War, the American Civil War and the Franco-German War, suggestions were made in regard to the employment of poisonous gases, but they were in no case entertained. The use of such instruments of warfare was reserved for the Great War; the German armies<sup>1</sup> were the first to resort thereto systematically and on an extensive scale, and their example was followed by other belligerents. The effects produced will have left no one in doubt as to the barbarous character of the innovation.

Asphyxiating gases.

The use of poisoned weapons was always regarded as an outrageous practice fit only for uncivilised tribes; and many ancient codes contain emphatic injunctions on the point. The employment of poison in general being forbidden by modern customary law as well as by the Hague rules, it follows that the poisoning of wells (which appears to have been resorted to in South-West Africa in the Great War) is unlawful. Further, the use of poison and deleterious gases having been prohibited, it follows that the deliberate spreading of contagious diseases is equally illegal.

Use of poison.

The question of the use of submarine mines is of exceptional importance because the interests of neutrals are directly affected. China, at the Hague in 1907, estimated that from five to six hundred Chinese subjects had been killed by the mines with which the seas were scattered during the Russo-Japanese War.<sup>2</sup> The Institute of International Law considered the question in 1906, and adopted rules<sup>3</sup> prohibiting the placing of anchored or floating mines in the high seas, and prohibiting belligerents from placing mines in their own waters or those of the enemy which were liable on displacement to be a danger to navigation outside such waters. This latter rule was to apply to neutrals who might place in their waters any mechanical contrivances for the safeguarding of

Submarine mines.

<sup>1</sup> Cf. the *Report of the Belgian Commission*, April 24, 1915.

<sup>2</sup> Pearce Higgins, p. 329.

<sup>3</sup> *Ibid.* p. 332.

their own neutrality; and neutrals were to be forbidden to place such in the passage of straits leading to the open sea. In all cases notification to neutral commerce was to be obligatory, and the state violating these rules was to be responsible for any damage done.

The Hague  
Conference.

At the Hague Conference of 1907<sup>1</sup> there was much difference of opinion on the subject. Great Britain was anxious for the total prohibition of automatic submarine contact mines which are unanchored or which do not become harmless on breaking from their moorings; for the total prohibition of the employment of such mines for the purposes of commercial blockades; and for the restriction of the right of laying mines to the territorial waters of the belligerents, with an extension to ten miles (subject to proper warning to neutrals) in the case of the defence of military ports, having at least one large graving-dock, and provided with the equipment necessary for the construction and repair of ships of war, and in which a staff of workmen paid by the state to construct and repair ships of war is maintained in time of peace. There was, however, an unwillingness on the part of states with small navies (*e.g.* Italy) to give up the right to use unanchored mines, though it was agreed that they ought to be so constructed as to become harmless after a short time; and there was also an objection, particularly on the part of Germany, to the restriction of the right of laying mines to territorial waters. Finally, after much discussion, a Convention<sup>2</sup> was drawn up, which was signed, subject to many reservations; Great Britain in particular declaring that it could not be taken as conclusive, or as more than a first step towards the provision of adequate guarantees for the protection of the undoubted rights of neutral shipping. The Convention was ratified on behalf of Great Britain in November, 1909, with the reservation of the right to treat as unlawful certain acts, even if not prohibited by it.

The Mines  
Convention.

By its preamble the Convention is admittedly merely provisional 'until such time as it may be found possible to formulate rules on the subject, which shall insure to the interests involved all the guarantees desirable.' The laying of unanchored automatic contact mines was forbidden, unless they are so constructed as to become harmless one hour at most after those who laid them have lost control over them.<sup>3</sup> This was objected to by Germany; she was, however, willing to forbid the use of unanchored mines altogether for five years, an offer which was not accepted by a sufficient majority.

<sup>1</sup> Pearce Higgins, pp. 328 *seq.*

<sup>2</sup> No. VIII of 1907.

<sup>3</sup> Art. 1 (1).



It was also forbidden to lay anchored mines which do not become harmless as soon as they have broken loose from their moorings, or to use torpedoes which do not become harmless when they have missed their mark.<sup>1</sup> But the whole effect of these restrictions was weakened by a subsequent provision that powers which do not own perfected mines of the description referred to, and which consequently could not at present carry out the rules, undertake to convert the *matériel* of their mines as soon as possible, so as to bring it into conformity with these requirements. Great Britain attempted, but without success, to procure the insertion of a time limit.

Various efforts were made to limit the area within which mines may be laid, but nothing could be agreed upon except that 'the laying of automatic contact mines off the coasts and ports of the enemy, with the sole object of intercepting commercial shipping, is forbidden';<sup>2</sup> and to this Germany objected on the very good ground that it means nothing, as the belligerent who lays the mines will invariably declare that he has some other object in view. There is practically nothing, therefore, in the Convention to prohibit blockade by mine; which is probably a violation of the rule that a blockade, to be valid, must be effective, and substitutes immediate destruction without inquiry, in the place of capture, as the penalty for blockade-running.<sup>3</sup> An attempt was made to procure the prohibition of the employment of anchored mines except for defence and coast protection, but this also failed to secure sufficient support. It was further provided that, when anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping; and belligerents undertook to do their utmost to render these mines harmless after the lapse of a limited time, and, should they cease to be under observation, to notify the danger-zones as soon as military exigencies permit, by a notice to mariners and neutral Governments.<sup>4</sup> The same rules were laid down for neutrals who laid mines off their coasts,<sup>5</sup> and each power undertook to do its best, at the close of a war, to remove the mines it had laid.<sup>6</sup>

On behalf of Great Britain, Sir Ernest Satow pointed out<sup>7</sup> that the Convention imposed no restriction as to the placing of anchored mines, 'which consequently may be laid wherever

<sup>1</sup> Art. 1 (2) and (3).

<sup>2</sup> Art. 2.

<sup>3</sup> As to the practice in the Great War, see *infra*, pp. 392, 393.

<sup>4</sup> Art. 3.

<sup>5</sup> Art. 4.

<sup>6</sup> Art. 5.

<sup>7</sup> *Parl. Papers, Misc.* No. 4 (1908), p. 54; and see Pearce Higgins, pp. 340-345.



the belligerent chooses: in his own waters for self-defence, in the waters of the enemy as a means of attack, or, lastly, on the high seas, so that neutral navigation will inevitably run great risks in time of naval war, and may be exposed to many a disaster.' In fact, the only substantial result of the Conference is the prohibition of the use of floating mines or anchored mines, which may break loose, unless they are so constructed as to become harmless within a very short time; and this will only be substantial if states refrain from availing themselves of the very large loophole provided by Art. 6.

In view of these considerations, Great Britain, as has already been stated, reserved the right to treat as unlawful acts not prohibited by the Convention; and the Convention itself contained an agreement<sup>1</sup> to re-open the whole question six months before the expiration of the period of seven years for which it was to remain in force, in the event of the question not having been taken up and settled by the Third Peace Conference.

British and  
German  
declarations  
at the  
Hague.

It may be recorded here that, after the Mines Convention had been voted on, the British representative referred to made the following declaration before the Conference: 'The British delegation desires to declare that it cannot regard this arrangement as furnishing a final solution of the question, but only as marking a stage in international legislation on the subject. It does not consider that adequate account has been taken in the Convention of the right of neutrals to protection, nor of humanitarian sentiments which cannot be neglected; it has done all that is possible to bring the Conference to share its views, but its efforts in this direction have remained without result. The high seas . . . are a great international highway. If in the present state of international law and custom belligerents are permitted to fight their battles there, it is none the less incumbent on them to do nothing which might, long after their departure from a particular place, render this highway dangerous to neutrals who have an equal right to use it. We declare without hesitation that the right of the neutral to security of navigation of the high seas ought to take precedence of the transitory right of the belligerent to employ these seas as the scene of the operations of war.' Then he added that as the Convention arrived at 'constitutes only a partial and insufficient solution of the problem, it cannot . . . be regarded as a complete exposition of international law on the subject.'

In reply to this statement the German representative, Baron Marschall von Bieberstein, made a speech which was no

<sup>1</sup> Art. 12.

less noteworthy. He admitted that there are general principles applicable to the subject in question besides the written provisions of Conventions, but at the same time he emphasised the exigencies of military necessity: 'A belligerent who lays mines assumes a very heavy responsibility towards neutrals and peaceful shipping. On that point we are all agreed. No one will resort to such means unless for military reasons of an absolutely urgent character. But military acts are not governed solely by principles of international law. There are other factors. Conscience, good sense and the sentiment of duty imposed by principles of humanity will be the surest guides for the conduct of sailors, and will constitute the most effective guarantee against abuses. The officers of the German navy, I loudly proclaim it, will always fulfil in the strictest fashion the duties which emanate from the unwritten law of humanity and civilisation. I have no need to tell you that I entirely recognise the importance of the codification of rules to be followed in war. But it would be well not to issue rules the strict observance of which might be rendered impossible by the force of things. It is of the first importance that the international maritime law which we desire to create should only contain clauses the execution of which is possible from a military point of view, even in exceptional circumstances. . . . As to the sentiments of humanity and civilisation, I cannot admit that there is any Government or country which is superior in these sentiments to that which I have the honour to represent.'

Here we find a reiteration of the claims of military necessity—claims that had been persistently advanced by German writers, soldiers and statesmen, such as Clausewitz, Bismarck, Moltke, Bernhardi and the compilers of the recent War Manual; but we also find a public assurance—indeed, a proud boast—of the honour and chivalry of the German armed forces. The Great War has provided a sinister commentary on these high professions. Soon after the outbreak of the war the British Admiralty protested that the Germans had indiscriminately laid mines on the ordinary trade routes, on the chance of sinking merchant vessels here and there, and not conformably to any military scheme. These proceedings being persisted in, the British authorities announced that they were compelled in self-defence and in retaliation to sow mines in the southern waters of the North Sea. Their position was indicated, and precautions were taken in the interests of neutral shipping.<sup>1</sup>

<sup>1</sup> *Parl. Papers, Misc.* No. 6 (1915), p. 20.

Similarly, and for the same reasons, Russia laid mines in the Baltic and specified the dangerous zones. Later the Admiralty extended the military area over the whole of the North Sea, owing to the increasingly lawless mine-laying by the Germans, which was often carried out under a neutral flag by trawlers and other protected vessels.<sup>1</sup>

Suggested  
rules.

Before the Great War broke out it was generally recognised that the Mines Convention would prove to be inadequate to protect neutral shipping. The question was investigated by the Institute of International Law at Paris in 1910 and at Madrid in 1911; and a series of regulations was adopted, of which the following are the most important: <sup>2</sup>

(1) It is forbidden to place anchored or unanchored automatic mines in the open sea (the question of the laying of electric contact mines in the open sea being reserved for future consideration).

(2) Belligerents may lay mines in their own and in the enemy's territorial waters, but it is forbidden (a) to lay unanchored automatic contact mines which do not become harmless one hour at most after those who laid them have lost control over them; (b) to lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings.

(3) A belligerent is only allowed to lay mines off the coasts and ports of the enemy for naval and military purposes; he is not allowed to lay them there in order to establish a maritime or commercial blockade.

(4) If mines are laid, all precautions must be taken for the safety of peaceful navigation, and belligerents must, in especial, provide that mines become harmless after a limited time has elapsed. In case mines cease to be under observation the belligerents must, as soon as military exigencies permit, notify the danger zones to mariners and also to the Governments through the diplomatic channel.

(5) The question as to the laying of mines in straits is reserved for future consideration.

(6) At the end of the war each power must remove the mines laid by it. As regards anchored automatic contact mines laid by one of the belligerents off the coasts of the other, their position must be notified to the other party by the power

<sup>1</sup> See more fully, Phillipson, *Int. Law and the Great War*, pp. 378 seq.; J. W. Garner, in *Amer. Journ. of Int. Law*, vol. ix (1915), pp. 86 seq.

<sup>2</sup> *Annuaire*, vol. xxiv (1911), p. 301; cited by Oppenheim, vol. ii, pp. 229-231.



which laid them, and each power must proceed with the least possible delay to remove the mines in its own waters. The power whose duty it is to remove the mines after the war must make known the date at which the removal of the mines is complete.

(7) A violation of these rules involves responsibility on the part of the guilty state. The state which has laid the mines is presumed to be guilty unless the contrary is proved, and an action may be brought against the guilty state, even by individuals who have suffered damage, before the competent International Tribunal.

On August 23, 1914, the Press Bureau stated that the Germans were laying mines indiscriminately upon the ordinary trade routes, and not for definite military purposes (*e.g.* the closing of a military port, or as an operation against a fighting fleet), and that as a result of such conduct several neutral vessels were sunk. Later, British trawlers and liners, as well as additional neutral ships, were destroyed. On October 2, the Admiralty announced that Great Britain was obliged, in the interest of self-defence and by way of retaliation, to sow mines in the southern areas of the North Sea. Unlike the German authorities, the British indicated the position and made regulations for the safety of neutral merchantmen. Soon afterwards the French Minister of Marine notified that as the Austrian navy laid mines in the Adriatic the French fleet was obliged to do the same. The Germans continuing and extending their wanton proceedings, the Admiralty declared (November 2) the whole of the North Sea to be a military area, and warned all merchant shipping of the dangers from mines which it was found necessary to lay. That neutral commerce was thus seriously interfered with is unfortunate; but such interference would not have come about had the Germans refrained from mine-laying in the open sea. 'Now when one belligerent persists in lawless and unprincipled proceedings, it would be sheer madness on the part of the adversary to adopt a policy of acquiescence or tacit disapproval. If self-preservation cannot be secured on the one side and decent conduct enforced on the other but by retaliatory measures, then such measures are perfectly justifiable and legitimate when they are applied with no more rigour than the exigencies of the occasion demand. The drastic step, then, taken by the British Government in declaring the North Sea a military area is amply justified by the circumstances.'<sup>1</sup>

Use of mines  
in the Great  
War.

<sup>1</sup> Phillipson, *Int. Law and the Great War*, p. 38c.

Prisoners of  
war.

In ancient times prisoners taken in war were liable to be put to death in cold blood, or to be enslaved. Later the practice of ransom was introduced, which, in the feudal wars of the middle ages, proved to be a source of enrichment to commanders, who were empowered to dispose of their captives as they thought fit. Those who were not ransomed were not infrequently subjected to cruel treatment. Gradually relaxations were introduced, thanks to the influence of chivalry, the Church and jurists, as well as to the growing conception of the personality of the state. Arrangements were then made between the belligerent states themselves for the ransom of their respective captives, or for effecting an exchange. In the seventeenth century we find treaties fixing a scale of value. Perhaps the latest instance is that of 1780 between England and France: an English admiral or a French marshal was estimated to be worth sixty men, lower ranks were assessed in proportion, and a man was reckoned to be worth one pound sterling.<sup>1</sup> For a long time there were no generally accepted rules regulating the position and fate of prisoners of war; and it is only recently that regulations were definitely established.

The provisions of the Brussels Declaration, 1874, were adopted, with modifications and additions, by the Hague Conference of 1899;<sup>2</sup> and the rules of the latter were again accepted, with certain alterations, by the Hague Conference of 1907, whose Convention<sup>3</sup> is therefore the existing law on the subject.

It is laid down that they are in the power of the hostile Government, and not of any individual or corps; that they must be humanely treated, and that all their personal belongings, except arms, horses and military papers, remain their property.<sup>4</sup> They may be interned in a town, fortress, camp or any other locality, and are bound not to go beyond certain fixed limits; but they can only be confined as an indispensable measure of safety,<sup>5</sup> and only while the circumstances which necessitate their confinement continue to exist,<sup>6</sup> confinement being more stringent than internment. The state may utilise the labour of prisoners of war other than officers<sup>7</sup>

<sup>1</sup> See Manning, *Law of Nations*, book iv, chap. viii.

<sup>2</sup> Annex to Convention II.

<sup>3</sup> Convention IV, Arts. 4-20.

<sup>4</sup> Art. 4.

<sup>5</sup> Art. 5.

<sup>6</sup> These last words were added in 1907.

<sup>7</sup> Added in 1907. But before this rule was made the Japanese had already refrained from imposing forced labour on Russian officers in 1904-5; cf. N. Ariga, *La Guerre russo-japonaise au point de vue de droit international* (Paris, 1907), p. 114. Naval officers are not explicitly included in the Hague Regulations; but in 1907 the *vœu* was expressed that the regulations in land warfare should be as far as possible applied to naval warfare.

(who, however, are in proper cases to be allowed full pay, which must be repaid by their Government),<sup>1</sup> according to their rank and aptitude. Their tasks shall not be excessive, and shall have nothing to do with the military operations, and they are to be paid for such work (if it is in the public service) according to the scale in force for soldiers doing similar work, or, if there is no such scale fixed, at rates proportional to the work done.<sup>2</sup> Whether prisoners may, under this provision, be employed in the construction of fortifications distant from the scene of hostilities is a controverted question. The better view is that they may not be so employed; for the scene of operations may at any time be transferred to the locality of their work, which might be utilised against their own country, and they might moreover be compelled to participate there in operations against the state to which they owe allegiance. Services of a neutral character may be imposed, *e.g.* those relating to military hospitals and ambulances. Different kinds of out-of-door labour of a civilian character are the most suitable. The wages of prisoners shall go towards improving their position, and the balance shall be paid them at the time of their release, after deducting the cost of their maintenance.<sup>3</sup>

The Government into whose hands prisoners of war have fallen is bound to maintain them. Failing a special agreement between the belligerents, they shall be treated as regards food, quarters and clothing on the same footing as the troops of the Government which has captured them.<sup>4</sup> Prisoners of war shall be subject to the laws, regulations and orders in force in the army of the state into whose hands they have fallen. Any act of insubordination warrants the adoption, as regards them, of such measures of severity as may be necessary. Escaped prisoners, recaptured before they have succeeded in rejoining their army, or before quitting the territory occupied by the army that captured them, are liable to disciplinary punishment. Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment for the previous flight.<sup>5</sup>

Every prisoner of war, if questioned, is bound to declare his true name and rank, and, if he disregards this rule, he is liable to a curtailment of the advantages accorded to the prisoners of his class.<sup>6</sup>

Prisoners may be set at liberty on parole if the laws of

<sup>1</sup> Art. 17.

<sup>4</sup> Art. 7.

<sup>2</sup> Added in 1907.

<sup>5</sup> Art. 8.

<sup>3</sup> Art. 6.

<sup>6</sup> Art. 9.



their country authorise it, and in such a case they are bound, on their personal honour, scrupulously to fulfil the engagements they have contracted, and their own Government may not require or accept from them any service contrary to the parole given.<sup>1</sup> A prisoner of war cannot be forced to accept his liberty on parole; similarly the hostile Government is not obliged to assent to the prisoner's request to be set at liberty on parole.<sup>2</sup>

Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying.<sup>3</sup>

Information  
bureau.

Provision is also made for the institution of an information bureau for the purpose of answering all inquiries about prisoners, collecting and forwarding objects of personal use, valuables and letters, etc.<sup>4</sup> Special provision is made for facilitating the work of relief societies,<sup>5</sup> for the admission free of duty of gifts and relief in kind,<sup>6</sup> and for the free exercise by prisoners of their religion<sup>7</sup> and of their right of making wills.<sup>8</sup>

There is a good deal of evidence that during the Great War the German authorities deliberately disregarded many of the above provisions relating to prisoners of war;<sup>9</sup> and these provisions were not innovations made by the Hague Conferences, but for the most part were established rules of the customary law of nations.

Spies.

These rules have no application to captured spies. Of spies, Vattel<sup>10</sup> says: '[They] are generally condemned to capital punishment, and not unjustly. . . . For this reason a man of honour, who would not expose himself to die by the hands of the common executioner, ever declines serving as a spy. He considers it beneath him, as it seldom can be done without some kind of treachery.' This view has received the sanction of both writers and soldiers, but it is difficult to defend upon satisfactory grounds. Stratagems and ruses are universally practised in war, and it is not easy to see that

<sup>1</sup> Art. 10.

<sup>2</sup> Art. 11. The punishment for breach of parole is death. <sup>3</sup> Art. 13.

<sup>4</sup> Art. 14. With regard to the working of the British information bureau during the Great War, see R. F. Roxburgh, *The Prisoners of War Information Bureau in London* (London, 1915).

<sup>5</sup> Art. 15.

<sup>6</sup> Art. 16.

<sup>7</sup> Art. 18.

<sup>8</sup> Art. 19.

<sup>9</sup> Cf. *Parl. Papers, Misc.* (1915), Nos. 5, 7, 8, 11, 14; (1916), Nos. 3, 10, 16, 19, 21, 25, 26, 34; (1917), No. 8.

<sup>10</sup> *Droit des gens*, liv. iii, chap. x, § 179.

spying, unless aggravated by dishonouring circumstances in no way essential to it, is morally more culpable. The distastefulness of the employment, and its lack of distinction, together with the distressing nature of the penalty risked, call for remarkable valour and constancy in the spy. Lord Wolseley has recognised the reasonableness of the view in the following observations: 'As a nation we are brought up to feel it a disgrace even to succeed by falsehood. The word "spy" conveys something as repulsive as "slave." We keep hammering along with the conviction that "honesty is the best policy," and that truth always wins in the long-run. These sentiments do well for a copybook, but a man who acts upon them had better sheath his sword for ever.'<sup>1</sup>

A spy was defined in 1899 and 1907<sup>2</sup> as a person who, Who is a spy. acting clandestinely or on false pretences, gathers, or seeks to gather, information in the zone of operations of a belligerent with the intention of communicating it to the adverse party. Soldiers, not disguised, who have penetrated into the zone of operations of the enemy with this object, are not to be treated as spies; nor are soldiers, or civilians, openly "carrying out their mission, charged with conveying dispatches for their own or the enemy's army, nor persons sent in balloons to convey dispatches, or to maintain communication between the various parts of an army or territory. A spy cannot be punished without trial<sup>3</sup> and cannot be treated as a spy if captured after he has rejoined his own army.

As one of the necessary elements of espionage in the sense contemplated by international law is the commission of the act within the zone of belligerent operations, a person caught spying outside that zone may not be charged with espionage, though his conduct may be regarded by the captor as a serious offence—sometimes designated a 'war crime' or 'war treason' in imitation of the German terminology. Under the present law Major André could not have been convicted of espionage, as he was not seeking information. Having been sent by General Sir Henry Clinton to Benedict Arnold, an American commandant, to negotiate the surrender of a certain fortress to the British forces, 1780, he put on civilian clothes and, by means of a false passport given to him by Arnold, was to pass through the American lines. He was, however, captured, and

<sup>1</sup> If the objection to spying is a moral one, the part played by those who employ him would appear to be less respectable than that of the spy himself. The latter at least puts his own neck into danger.

<sup>2</sup> Art. 29 of Annex to Convention II of 1899 and IV of 1907.

<sup>3</sup> Art. 30.

tried at Washington by a court martial whose verdict was that 'agreeably to the laws and usages of nations he ought to suffer death'; and he was hanged, October 2, 1780. Reference may be made to a recent instance—that of one Lody, a German subject, who was charged, October 30, 1914, before a General Court Martial in London, with attempting to communicate information to the German authorities. As the offence was committed in Edinburgh and Dublin—places outside the zone of belligerent operations—it was not described as espionage, but as a 'war crime' or 'war treason.' The accused was found guilty, condemned to death, and shot.

Treatment  
of wounded.

That the sick or wounded should not be ill-treated has long been a recognised rule of warfare. From time to time measures were adopted to alleviate their sufferings; sometimes religious bodies voluntarily undertook to perform such tasks, sometimes conventions *ad hoc* were concluded between belligerents. A step in advance was taken in the eighteenth century, when combatant states began to tend the enemy's wounded apart from treaty arrangements. Further, about the middle of the nineteenth century a movement was inaugurated in several European countries for establishing an international medical and sanitary organisation. In 1863 a semi-official Conference was held at Geneva, where it was proposed to set up aid societies, to neutralise the medical services under a distinctive emblem. The following year the Swiss Government invited delegates from all the leading states to meet in formal conference at Geneva. The result was the Geneva Convention, which was in the first place signed by the representatives of sixteen states, and was subsequently accepted by other countries.

This Convention<sup>1</sup> did much to ameliorate the condition of the sick and wounded; and a supplementary Conference at Geneva in 1868 drew up a Convention in part amending that of 1864, and in part extending its principles to naval warfare, which was in fact never ratified. At the Hague, in 1899, the Swiss Government was requested to call a Conference to revise these rules, and at Geneva, in 1906, a further Convention was drawn up and ratified by a number of powers, but not by all those who had acceded to the Convention of 1864. Of the more important powers Austria, Germany, Great Britain, Italy, Japan, Russia, Spain, the United States and Turkey are at present bound by the Convention of 1906:

<sup>1</sup> Pearce Higgins, pp. 12, 35.



while China, France, Greece, Holland, Norway and Sweden are still subject to that of 1864.

By the Convention of 1906, the sick and wounded are to be taken care of without distinction of nationality, but a beligerent when compelled to abandon his own sick and wounded must, so far as military exigencies permit, leave with them a portion of his medical *personnel* and material.<sup>1</sup> The sick and wounded are prisoners of war.<sup>2</sup> Provision is made for a proper search of the field of battle, for protection against pillage and maltreatment,<sup>3</sup> and for the exchange of information as to the wounded and dead. It is left to the discretion of the military authorities to appeal to the charitable zeal of the inhabitants to assist in the task of collecting and taking care of the wounded.<sup>4</sup> Medical units (*les formations sanitaires mobiles*) and the establishments of the medical service (*les établissements fixes du service de santé*) are protected,<sup>5</sup> together with their *personnel* and guards, and all persons engaged exclusively in the collection, transport and treatment of the wounded and the sick;<sup>6</sup> as also is the *personnel* of duly-recognised and notified voluntary aid societies.<sup>7</sup> The medical staff if captured by the enemy are not prisoners, but must continue to carry on their duties under his direction,<sup>8</sup> receiving the usual pay and retaining their material, subject to the necessities of the enemy, who is to restore anything he may borrow.<sup>9</sup> Convoys of evacuation are similarly protected,<sup>10</sup> and provision is made for the use and observance of the 'red cross'<sup>11</sup> (the red cross<sup>12</sup> on a white ground being the distinctive device adopted as a compliment to Switzerland, and formed by reversing the Swiss colours). Great Britain was unable to agree to the prohibition of the use of this emblem 'either in time of peace or war, except to protect or to indicate the medical units, etc., protected by the Convention,'<sup>13</sup> or to the undertaking to legislate or propose legislation for the enforcement of this prohibition,<sup>14</sup> provisions which were specially directed against the use of the red cross as a trademark. The objection to these provisions was not based on principle but on practical difficulties.

<sup>1</sup> Art. 1.<sup>2</sup> Art. 2.<sup>3</sup> Art. 4.<sup>4</sup> Art. 5.<sup>5</sup> Cf. p. 198.<sup>6</sup> Arts. 6, 7, 8, 9.<sup>7</sup> Art. 10.<sup>8</sup> Art. 12. During the Great War this Article was interpreted differently by the British and German Governments; see *Parl. Papers, Misc.* No. 8 (1915), pp. 59-63.<sup>9</sup> Arts. 13, 14.<sup>10</sup> Art. 17.<sup>11</sup> Arts. 18-23.<sup>12</sup> Turkey and Persia have not adopted this emblem, though the Convention makes it clear that it has no religious significance: the former uses the Red Crescent, and the latter the Lion and Sun.<sup>13</sup> Art. 23.<sup>14</sup> Arts. 27, 28.

The signatory powers undertook to instruct their troops in the provisions of the Convention, and to bring these provisions to the notice of the civil population,<sup>1</sup> and to take such measures as should be necessary for the repression of pillage, and of the maltreatment of the sick and wounded; and the Convention ended with a 'vœu' that if the cases and circumstances permit, the contracting powers will submit to the Permanent Court at the Hague any differences which may in time of peace arise between them relative to the interpretation of the Convention. To this, however, Great Britain and Japan refused to assent.

Hospital  
ships.

An attempt was made in 1868, as we have seen,<sup>2</sup> to apply these principles to naval warfare, but it was not till 1899 that anything definite was done. In that year there was drawn up at the Hague a Convention on the subject, and this, with certain alterations made in 1907<sup>3</sup> (due chiefly to the intervening Geneva Convention of 1906), is now accepted with a few reservations by all the powers present at the Conference of 1907; though the Convention (No. X of 1907) has not yet been ratified by Great Britain.

By this Convention, hospital ships under a belligerent's control and duly notified are declared free from capture and from the restrictions applicable to warships calling at neutral ports; and that whether they are equipped by the state, or by private individuals or societies whether of belligerent or neutral nationality.<sup>4</sup> They must afford relief without distinction of nationality, and must not be used for any military purpose, or hamper the movements of the combatants; and the belligerents have the right of control and search.<sup>5</sup> They are to be distinguished by being painted white, with a horizontal band of green if equipped by the state, or of red if equipped by private charity, and must fly the red cross and their national flag, with, if they are neutral, the flag of the belligerent under whose control they act.<sup>6</sup> The question of protection at night presented difficulties, as any arrangement of lights would lend itself too easily to fraud,<sup>7</sup> and any compulsory carrying of lights would seriously hamper the fleet which was attended by the hospital ships; so the Conference had to be content with a general instruction that hospital

<sup>1</sup> Art. 26.

<sup>2</sup> See p. 197.

<sup>3</sup> Convention III of 1899, and X of 1907.

<sup>4</sup> Arts. 1, 2 and 3.

<sup>5</sup> Art. 4.

<sup>6</sup> Art. 5.

<sup>7</sup> See Pearce Higgins, p. 384. In the Russo-Japanese War Japan declined on this ground to accept distinctive lights.

ships 'must, subject to the assent of the belligerent they are accompanying, take the necessary measures to render their special painting sufficiently plain.'<sup>1</sup> The use of the signs, in peace or war, for any other purpose is prohibited,<sup>2</sup> but to this Great Britain was unable to agree, for the same reason as was the ground of their refusal to assent to the similar provision in the Geneva Convention of 1906.<sup>3</sup>

Provision is made for the protection of the sick bays in the event of a fight on board a vessel;<sup>4</sup> but their inviolability, and that of hospital ships generally, is lost if they are made use of to commit acts harmful to the enemy,<sup>5</sup> but not merely by reason of the fact that their staff is armed or wireless telegraphy apparatus is on board.<sup>6</sup> Neutral vessels may be appealed to to take on board and nurse the sick and wounded, and if they do so, whether of their own accord or in response to such appeal, they are to enjoy 'special protection and certain immunities,'<sup>7</sup> according to circumstances. In any case, the mere fact of having the sick and wounded on board is not to subject them to capture, though it cannot in itself confer upon them immunities for other breaches of neutrality which they may be committing or have committed.<sup>8</sup> The staff, religious and medical, are protected as in land warfare,<sup>9</sup> and soldiers, sailors and persons attached officially to the fleets or armies when wounded are to be respected and taken care of by the captors.<sup>10</sup>

During the Great War signal violations of these provisions were committed: e.g. in March, 1916, the *Portugal*, a Franco-Russian hospital ship, was torpedoed by a Turkish submarine in the Black Sea; in March, 1917, the *Asturias*, a British hospital ship, was sunk by a German submarine; and several

<sup>1</sup> Art. 5.      <sup>2</sup> Art. 6.      <sup>3</sup> See p. 233.      <sup>4</sup> Art. 7.

<sup>5</sup> Art. 8. Cf. the case of the *Orel* (or *Aryol*), a Russian hospital ship that was condemned in 1905 by the Japanese Prize Court for having carried able-bodied prisoners and material for military use, and for having performed reconnoitring services (Takahashi, *Int. Law Applied to the Russo-Japanese War* (1908), pp. 620 *seq.*; 2 R. & J. Pr. Cas. 354). The *Kaiserrie*, a Turkish vessel, was condemned by the Italian Prize Court (1913) on the ground that she acted as a military transport.

Similarly, the *Ophelia*, purporting to be a German hospital ship, was condemned in 1915 by the British Prize Court, on the ground that she was not constructed, adapted or used for the special and sole purpose of affording aid to the sick and wounded, and that she was adapted and used as a signalling ship for military purposes ((1915), P. 129: 1 P.C. 210). This decision was affirmed the following year by the Privy Council: (1916), 2 P.C. 150.

<sup>6</sup> Art. 8. The Privy Council held in *The Ophelia* (1916), 2 P.C. at p. 170, that the permission to have wireless telegraphy apparatus on board does not justify sending messages by a secret code; and if such messages are sent, a record of them should be kept to prove their innocent character.

<sup>7</sup> Art. 9.

<sup>8</sup> Art. 7.

<sup>9</sup> Art. 10.

<sup>10</sup> Art. 11.



other British and allied hospital ships similarly suffered at the hands of the enemy.

Sick,  
wounded, or  
shipwrecked  
on neutral  
vessel.

Some difficulty was caused by the question of the right of a belligerent to seize wounded, sick or shipwrecked enemy subjects who have been picked up by, and are found on board, a neutral vessel. The right was denied by Great Britain in 1864, when a British yacht had picked up survivors from the *Alabama* off Cherbourg. No agreement on the point was arrived at in 1899; but in 1907 it was provided<sup>1</sup> that any belligerent warship may demand the surrender of the wounded, sick or shipwrecked who are on board military hospital ships, hospital ships belonging to relief societies or private individuals, merchant ships, yachts and boats of whatever nationality. There was some difference of opinion as to whether this was a new rule or a mere restatement of an old rule, France claiming (in opposition to the view of the British Government) that the right flowed naturally from the right of visit and search and capture, and that, strictly speaking, the mere fact of having enemy combatants on board rendered a neutral vessel liable to confiscation for 'unneutral service.' Great Britain did not accept the new rule in its entirety, but subject to the reservation that it should apply 'only to the case of combatants rescued during or after a naval engagement in which they have taken part';<sup>2</sup> thereby maintaining the objection to the theory that it is 'unneutral service' to pick up men in distress, while conceding within limits the reasonableness of the new rule.

It was also provided that the wounded, sick or shipwrecked picked up by a neutral warship must be so far as possible prevented from taking part in further operations of war.<sup>3</sup> Japan, in 1904, had claimed their surrender in such circumstances.<sup>4</sup> The new rule treats them as they are treated when they are landed on neutral territory.<sup>5</sup> It is to be noted, however, that when landed on neutral territory by a neutral merchant vessel, which has not met or given any undertaking to an enemy warship, they are probably not subject

<sup>1</sup> Art. 12. See Pearce Higgins, pp. 387 seq.

<sup>2</sup> *Parl. Papers, Misc. No. 6* (1908), p. 148.

<sup>3</sup> Art. 13. In accordance with this provision, the crew of the British submarine E 17, who were rescued by a Dutch warship, were interned in Holland.

Similarly, the survivors of the German warship *Cap Trafalgar* (1914), landed in the Argentine by a German auxiliary collier, and those of the British warship *India* (1915), landed in Norway by a British armed trawler and by the *India's* own boats, were interned.

<sup>4</sup> Pearce Higgins, p. 390.

<sup>5</sup> Art. 15.

to any such restriction on their future conduct.<sup>1</sup> If the word 'landed' ('débarqué') in the foregoing provision be interpreted strictly, it is by no means impossible to hold that men who swim to the neutral shore or escape from a wreck are excluded from the provision. Further, the shipwrecked, wounded or sick when captured are prisoners of war; and provision is made for a proper search for them after an engagement<sup>2</sup> and the exchange of information with regard to them between the belligerents,<sup>3</sup> as in the case of war on land, and for the instruction of the forces in, and the notification to the public of, the terms of the Convention.<sup>4</sup>

At a Conference at the Hague, in 1904,<sup>5</sup> a number of powers (including Germany, Austria, the United States, Japan, Russia, France, Spain and Italy) agreed to exempt hospital ships in time of war from all state taxes and dues levied in their ports. This Convention was accepted by twenty-five states; but Great Britain, though favourably disposed, declined to take part in the Conference, owing to the fact that these dues are levied by various authorities in her ports and legislation would be necessary to carry out the new provisions.

The Declaration of Brussels and the Hague Conventions set out briefly the undisputed law with regard to flags of truce, capitulations and armistices.<sup>6</sup> The inviolability of the bearer of the flag and of those who accompany him is guaranteed,<sup>7</sup> but the enemy commander is not bound to receive him in all circumstances<sup>8</sup> or (and this, though not expressly stated in the Convention, is hardly open to dispute) to cease fire at once, though the bearer must not be intentionally injured. All necessary precautions may be taken to prevent the bearer from obtaining information under the protection of the flag, and he may be temporarily detained if guilty of such a breach of confidence;<sup>9</sup> and the inviolability is lost on positive and incontestable proof that he has taken advantage of his privilege to provoke or commit an act of treachery.<sup>10</sup> In this latter case it would appear that he is liable to be treated as a spy, and a distinction is drawn between treachery and obtaining information, which may in practice be somewhat difficult to observe. But it is, no doubt, wise to provide that only the

<sup>1</sup> The survivors of the British warships *Cressy*, *Hogue* and *Aboukir* (1914), and of the German warship *Elbing* (1916), who were landed in Holland by neutral merchantmen, were released.

<sup>2</sup> Art. 16.

<sup>3</sup> Art. 17.

<sup>4</sup> Art. 20.

<sup>5</sup> Pearce Higgins, p. 392.

<sup>6</sup> See Convention IV of 1907.

<sup>7</sup> Art. 32.

<sup>8</sup> Art. 33.

<sup>9</sup> Art. 33.

<sup>10</sup> Art. 34.

strictest proof of something more than a mere attempt to obtain information shall justify the severest penalty; for only thus can the position of the flag-bearer be removed from the region of hasty misunderstandings and hasty reprisals.

Capitulations.

Of capitulations or agreements for conditional surrender, all that was laid down was that they must take into account the rules of military honour and be scrupulously observed.<sup>1</sup> Their conditions and circumstances may be infinitely varied, and points may arise as to the authority of those who enter into them, according to the nature of the terms granted and accepted. The case of the capitulation of El Arish in 1800<sup>2</sup> illustrates the necessity, in certain cases, for ratification by the state and by a superior commander.

Armistices or truces.

Similarly, on the question of armistices or truces, only provisions of a very vague character were agreed upon. An armistice is described as suspending military operations by mutual agreement between the belligerent parties, and if its duration is not defined, the belligerents may resume operations at any time, provided always that the enemy is warned within the time agreed upon in accordance with the terms of the armistice.<sup>3</sup> An armistice may be general (suspending the entire military operations between the parties) or local (suspending the operations between certain portions of their armies and within a fixed area<sup>4</sup>); it must be officially notified in good time;<sup>5</sup> the relations with and between the populations in the theatre of war will be regulated by the terms of the armistice;<sup>6</sup> and any serious violation of the armistice gives the other party the right of denouncing it, and even, in case of urgency, of resuming hostilities at once,<sup>7</sup> unless the breach is by individuals acting on their own initiative, in which case the injured party has only the right of demanding the punishment of the offenders and compensation.<sup>8</sup> The more important question of the things which may be done during an armistice is left untouched. In most cases, no doubt, this will be settled by the terms of the agreement; and in default of agreement the principle to be applied will be the maintenance of the *status quo*, that is to say, neither belligerent can strengthen his position in any way which

<sup>1</sup> Art. 35.

<sup>2</sup> Hall, 7th ed. p. 593.

<sup>3</sup> Art. 36.

<sup>4</sup> Art. 37.

<sup>5</sup> Art. 38.

<sup>6</sup> Art. 39. The English translation is so expressed; but the original French is 'les rapports . . . avec les populations et entre elles,' which seems to mean 'the relations with the populations and between them (the belligerents).' The point is, however, of little importance.

<sup>7</sup> Art. 40.

<sup>8</sup> Art. 41.



might have been prevented by the other had military operations continued.<sup>1</sup> The supply of provisions to a besieged place is usually, and should always be, dealt with by special stipulation; but the principle seems reasonable that such supply as is necessary for immediate consumption does not strengthen the besieged, but merely maintains them in their existing condition. This view, however, has not always been taken. Germany, for instance, in 1870, declined to act upon it when an armistice was granted to Paris; and any commander of a force which has nearly reduced the enemy by starvation may well contend that to let in any provisions at all is to supply the strength for a more prolonged resistance.

The authority to conclude armistices depends upon their purpose and extent, local commanders having power only in their own districts, and the authority of the state being necessary for a general armistice.<sup>2</sup>

Arrangements between belligerents with regard to such matters as the treatment of flags of truce, intercommunication during the war, whether by post, telegraph or otherwise, the treatment of the wounded, exchange of prisoners and the like, are usually contained in Conventions known as 'cartels'; and 'cartel ships' are ships employed in the carriage of exchanged prisoners and subject to special regulations ensuring that they shall be used in good faith for that object alone. Hence, if they engage in commercial traffic, carry dispatches or passengers, perform any hostile act, or abuse their position in any other way, they become liable to capture.<sup>3</sup> They are ordinarily immune, not only whilst carrying prisoners, but also whilst they are on their return voyage.<sup>4</sup>

<sup>1</sup> See Hall, 7th ed. pp. 585-8.

<sup>2</sup> Cf. Grotius, lib. iii, c. 22, § 8; Vattel, liv. iii, chap. 16, §§ 233-238.

<sup>3</sup> *The Venus* (1814), 4 C. Rob. 355; *La Rosine* (1800), 2 C. Rob. 372.

<sup>4</sup> *The Daifjie* (1800), 3 C. Rob. 139. Cf. *La Gloire* (1804), 5 C. Rob. 198.

## CHAPTER IV

### ENEMY PROPERTY ON LAND AND OCCUPATION OF ENEMY TERRITORY

Seizable  
property.

MANY exceptions to the old rule, that every species of enemy property may be appropriated at all times and in all places, have been admitted in the more tolerant practice of modern warfare. The principle underlying such exemptions is not always logically applied, but it has produced practical results of great importance. It is well stated by Hall in the following passage: <sup>1</sup> 'Property can be appropriated, of which immediate use can be made for warlike purposes by the belligerent seizing it, or which, if it reached his enemy, would strengthen the latter either directly or indirectly; but, on the other hand, property not so capable of immediate or direct use, or so capable of strengthening the enemy, is insusceptible of appropriation.'

By the Hague Conventions <sup>2</sup> it was laid down (so far as land warfare is concerned) that private property cannot be confiscated,<sup>3</sup> and that pillage is expressly (*formellement*) forbidden.<sup>4</sup> But all public movable property belonging to the enemy state is subject to capture, some kinds being liable to confiscation, and others (even if they belong to private persons) merely to sequestration:

'An army of occupation shall only take possession of cash, funds, and realisable securities which are strictly the property of the state, depots of arms, means of transport, stores and supplies, and generally all movable property belonging to the state which may be used for military operations. Apart from cases governed by naval law, all appliances adapted for the transmission of news, or for the transport of persons or goods, whether on land, at sea, or in the air, depots of arms, and in general all kinds of war material, may be seized, even if they belong to private individuals, but they must be restored and indemnities for them will be arranged at the conclusion of peace.'<sup>5</sup>

<sup>1</sup> 7th ed. p. 441.

<sup>2</sup> Convention IV of 1907, amending Convention II of 1899.

<sup>3</sup> Art. 46.

<sup>4</sup> Art. 47.

<sup>5</sup> Art. 53.

The words 'realisable securities' (*valeurs exigibles*) are purposely vague<sup>1</sup>—in German they have been translated as 'eintreibbare Forderungen,' the broad meaning of which is suable claims. They may mean either documents payable to bearer, or documents payable to order, or constituting merely the evidence of contract debts. The former may undoubtedly be seized and realised; as to the latter there is a difference of opinion which the Conference did nothing to settle. But according to the better view, they can only be realised by an enemy into whose hands they have fallen, when his possessory claim has been converted by conquest into a definitively proprietary right.<sup>2</sup>

A very humane relaxation, and one universally recognised Exemptions. in modern warfare, is contained in the following provision:

'The property of local authorities, as well as that of institutions dedicated to public worship, charity, education, and to science and art, even when state property, shall be treated as private property. Any seizure or destruction of, or wilful damage to, institutions of this character, historic monuments and works of science and art, is forbidden, and should be made the subject of proceedings.'<sup>3</sup>

There can be little doubt that the public feeling of to-day would view with strong resentment any attempt to injure or remove valuable works of art, genius or taste belonging to an enemy. France in her revolutionary wars enriched the galleries of Paris by the Corinthian Horses, the Dying Gladiator, the Apollo Belvedere, the Venus and the Laocoon. In 1815, all pictures and other monuments of art which had been forcibly seized by Napoleon, or acquired by treaty, were returned to the places from which they had been respectively taken. The grounds on which such restitution was insisted on were explained in a Note delivered by the British minister, Lord Castlereagh, to the ministers of the other allied powers at Paris, on September 11, 1815.<sup>4</sup>

It was contended that this act of expiatory justice was indefensible in view of Art. II of the military convention of July 3, 1815, under which the allied armies had entered Paris. That article was as follows: 'Les propriétés publiques, à

<sup>1</sup> Holland, *The Laws of War on Land*, p. 57; Westlake, Part II, p. 113.

<sup>2</sup> Heffter, § 134; Phillimore, Part XII, chap. iv; Hall, 7th ed. p. 442; Westlake, Part II, pp. 113, 114.

<sup>3</sup> Art. 56.

<sup>4</sup> De Martens, *Nouveau Recueil*, vol. ii, p. 632,



l'exception de celles qui ont rapport à la guerre, soit qu'elles appartiennent au Gouvernement, soit qu'elles dépendent de l'autorité municipale, seront respectées et les Puissances alliées n'interviendront en aucune manière dans leur administration et gestion.'<sup>1</sup> The surrounding circumstances, however, bear out Wellington's reply: 'I positively deny that this article referred at all to the museums or galleries of pictures.' The conduct of the allies was also strongly criticised by Sir Samuel Romilly<sup>2</sup> in the House of Commons on February 20, 1816. He relied particularly upon the contention that many of the acts of restitution were wholly irrational in their effects. Thus Venice when plundered was Italian; in 1816, pursuant to the Treaty of Campo Formio, she had become Austrian. The answer to this objection is that the restitution was made not to the political authority, but to the locality. Whatever changes may take place in the political circumstances of the kingdom of Greece, every one will desire the preservation in their present position of the remains of the Acropolis.

Destruction  
of protected  
buildings.

The immunities stated above have been hardly and gradually won, and it would probably be still held that they must give way to real belligerent necessity. In 1870, in the hope of bringing civilian pressure to bear upon the military authorities, the German forces bombarded Strasburg and destroyed the library, picture gallery; and part of the cathedral. The step, perhaps, was an extreme one, but behind the velvet scabbard of regulatory convention the presence of the sword is always discernible, and Lord Pauncefote, at the Peace Conference in 1899, was content to qualify the articles dealing with the conduct of war by the reservation, 'saving the necessities of war,'<sup>3</sup> and, as we have seen, the rules settled by the two Hague Conferences were purposely stated in the form of instructions for the guidance of troops, rather than of positive and obligatory enactment.

Practice in  
the Great  
War.

The deliberate destruction by the Germans during the Great War of cathedrals, churches, libraries, museums, town halls and other municipal buildings, works of art, etc., aroused the indignation of the world; and there is no doubt that all the allegations of this ubiquitous and sinister 'military

<sup>1</sup> Quoted by Halleck, 4th ed. vol. ii, pp. 80, 81.

<sup>2</sup> *Life of Romilly*, edited by his sons, vol. ii, p. 404.

<sup>3</sup> 'This reservation, Sir J. Pauncefote desired to point out, must be implicitly applied to any and to every code or compact by which it may be attempted to regulate the infinite variety of circumstances and conditions which arise in war' (Memorandum of Sir J. Ardagh to Lord Salisbury, July 5, 1899).

necessity' will fail to justify the relentless excesses committed. It may be said, in truth, that the conduct of the invaders of France and Belgium was animated by a desire to intimidate and terrorise the territories invaded rather than by the exigencies of any rationally interpreted military necessity.

The question of submarine cables presents special features.<sup>1</sup> Submarine cables. It was raised at the Hague Conference of 1899, but without any result; it formed the subject of a series of rules drawn up by the Institute of International Law in 1902; and at the Hague in 1907, one Article was agreed upon, affecting only such cables in so far as they come within the power of an army occupying enemy territory.

Such a cable may connect two neutral territories. In that case it is beyond doubt inviolable.<sup>2</sup> It may connect the belligerent territories, or two parts of the territory of one belligerent. In that case it may be cut anywhere except in neutral territorial waters.<sup>3</sup> It may connect belligerent with neutral territory. This may, on principle, be cut in the territorial waters, or in the territory, of the belligerent, because, in the words of Westlake, 'property durably affixed to the soil must share the fate of the soil.'<sup>4</sup> But the Hague Conference in 1907 made a concession to neutral interests by laying it down that such cables should not be seized or destroyed by an occupying force except in the case of absolute necessity, and that they must be restored, and indemnities for them arranged, at the conclusion of peace.<sup>5</sup> Occupying armies, however, are likely to see an absolute necessity for seizing if not destroying the land ends of such cables whenever they can; and in any case, if the occupation be effective, they will have them under complete control. There is, in fact, no reason on principle why they should not be treated, as they are in this Article, on a par with the land telegraphs of the country.

But beyond this, there is the question of the right to cut such cables between neutral and belligerent territory in the open sea. A strong difference of opinion, which has never been settled, disclosed itself during the discussion of the

<sup>1</sup> On submarine cables generally, see Phillipson, *Studies in International Law* (1908), pp. 55 *seq.*, and the references there given.

<sup>2</sup> Westlake, Part II, p. 116. Rule 1 of the Institute of International Law, adopted in 1902 (*Annuaire*, vol. xix, p. 331; and set out in Pearce Higgins, p. 271*n.*).

<sup>3</sup> Westlake, *ibid.*; Rule 2 of the Institute of International Law.

<sup>4</sup> Westlake, *ibid.* p. 117.

<sup>5</sup> Art. 54.

subject by the Institute of International Law; which passed by a majority the rule that such a cable 'cannot be cut in the open sea unless there is an effective blockade, and subject to the duty of re-establishing it within the shortest possible time.'<sup>1</sup> That it cannot be cut in neutral waters was agreed; and it is extremely doubtful whether even a blockade will be admitted to justify the cutting of it in the open sea. Such an operation may rightly be compared with the sinking of a neutral mail-boat, without visit or search, because it may conceivably be carrying hostile dispatches.<sup>2</sup>

Occupation  
of enemy  
territory.

According to the earlier custom of warfare, the invasion of a belligerent's territory by the enemy's force was often followed immediately by pillage or destruction. Grotius points out that in his day the practice of plunder and confiscation on the part of an invader was considered legitimate; but none the less the opinion was held that no more should be taken from the invaded population than was absolutely essential for the occupying army. In the eighteenth century, commanders not infrequently adopted various disciplinary measures for the purpose of restraining the behaviour of their troops; and sometimes a more regularised system of requisitioning was substituted for lawless looting. But practices varied with the spirit of commanders and the discipline of armies; and self-help and indiscriminate destruction never fell into disuse. It was held that the military occupation of the enemy's territory *ipso facto* conferred all the rights of sovereignty on the invader. Writers, however, like Vattel, refused to accept this doctrine, and contended that occupation in itself gave only a provisional and limited status, and could not become territorial appropriation until the occupying belligerent had completely ousted the enemy from the country in question and had definitively acquired it by all the acts and formalities of conquest or by an express treaty of cession.<sup>3</sup> This principle came to be more and more insisted upon, and with the establishment of standing armies and the consequent improvement of military law and discipline the progressive movement was considerably facilitated. About the middle of the nineteenth century, Governments began to issue written instructions to their armies; and soon afterwards international conferences began to meet for the purpose of laying down certain rules by agreement.

Thus, the rights of an army in occupation of enemy terri-

<sup>1</sup> Westlake, *ibid.* p. 117. Rule 3 of the Institute of International Law.

<sup>2</sup> *Ibid.* p. 118.

<sup>3</sup> *Droit des gens*, liv. iii, §§ 197, 198.



tory were considered in the draft Articles of the Declaration of Brussels (1874), and more particularly at the Hague Conferences, 1899 and 1907; and a number of rules were agreed upon, some of which have been already dealt with under the heading of 'Seizable Property.'

Territory is considered to be occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territory where such authority is established and in a position to assert itself.<sup>1</sup> In other words, occupation, like blockade, to be valid must be effective; and the old doctrine that it is equivalent to an assumption of complete sovereignty has given place to the doctrine that any rights possessed by an invader are only a part of his right to do what is necessary to carry the war to a successful conclusion.<sup>2</sup> Under the old practice it was considered permissible to exact from the inhabitants an oath of allegiance, and to press them into the service of the invading army. But as the rights of occupation depend merely on the military exigencies of the invader, they are only provisional; the national character of the locality is not legally changed, and consequently the inhabitants do not owe the invader even temporary allegiance. Hence, to extract an oath of allegiance from them or compel them to perform military duties of any kind is unlawful. As to what is meant by the requirement that the occupation must be effective, there cannot but be some doubt;<sup>3</sup> but the new rule may at any rate be taken as an expression of disapproval of the doctrine of 'presumptive occupation' prevalent during the Franco-German War, when Germany claimed to be in occupation of whole cantons, though doing little more than placarding a notice to that effect. The requirement does not mean that every square mile must be secured by vedettes, but that, from a military point of view, taking into consideration the nature of the country and the degree of mobility attainable, the control of the occupying force must be reasonably complete and diffusive.

The authority of the legitimate power having *de facto* passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and ensure, so far as

The occupant's authority and martial law.

<sup>1</sup> Art. 42 of Convention IV of 1907.

<sup>2</sup> Hall, 7th ed. pp. 492 *seq.* The decisions of Courts both here and abroad are in accordance with these principles: cf. *The Fama* (1804), 5 C. Rob. 115; *The Gerasimo* (1857), 11 Moo. P.C. 88; *Villaseque's Case* (1818), Ortolan, i, 324. Somewhat different views, however, were adopted in certain American cases, e.g. *U.S. v. Rice* (1819), 4 Wheaton, 246; *Fleming v. Page* (1850), 9 Howard, 615.

<sup>3</sup> *Ibid.* pp. 511 *seq.*

possible, public order and safety (*l'ordre et la vie publics*) while respecting, unless absolutely prevented, the laws in force in the country.<sup>1</sup> It is to be noted, however, that the expression 'public order and safety' scarcely represents the French original; for the words '*l'ordre et la vie publics*' imply also the entire social and commercial life of the community. If the occupant departs from the existing territorial law and from the prevailing rights and obligations of the citizens—and here Art. 23 (*h*) already mentioned is of special importance—it will be for him to prove, in case a question subsequently arises, that his departure was imperatively demanded by military exigencies. Moreover, whatever judicial and administrative modifications he makes must be compatible with the rules of international law and with the dictates of equity and justice—the Hague Conventions frequently stipulate that in the absence of clear written or customary law the principles of equity and justice shall be observed. The law introduced by the occupant in addition to, or as a substitute for, the local law, for the purpose of preserving order and ensuring his safety, constitutes his martial law. This is to be distinguished from the martial law proclaimed by the sovereign (on the continent the declaration is of a 'state of siege' or 'state of war') when a country is threatened with invasion or insurrection, and also from military law; these two kinds of law being branches of municipal law proper.<sup>2</sup> But martial law in the field or in occupied territory, though it may be composed of municipal dispositions, must not conflict with the established law of war and other provisions of the law of nations. Subject to this restriction, we may define it, in the words of an American judicial pronouncement, thus: 'Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is under his supreme control.'<sup>3</sup> The Duke of Wellington described it in the House of Lords on one occasion<sup>4</sup> as being 'neither more nor less than the will of the general who commands the army.' But he added that it is incumbent on the general to lay down the regulations and limits in conformity with which his will is to be carried out. And, as has been pointed out, these regulations and limits must be in harmony with the existing rules of international law. Hence the introduction and administration of

<sup>1</sup> Art. 43.

<sup>2</sup> As to military law and martial law, see Wheaton (ed. Phillipson), pp. 522 *seq.*

<sup>3</sup> *U.S. v. Diekelman* (1875), 92 U.S. 520.

<sup>4</sup> Hansard, 3rd series, vol. cxv, p. 880.

martial law can never justify military oppression on the part of the occupant.<sup>1</sup> The stringency of such law will depend on the peculiar circumstances of each case, *e.g.* on the degree, kind and imminence of danger to which the occupant is exposed, and on the conduct of the local inhabitants; but in no case is a commander entitled to disregard all considerations of honour and humanity, fairness and justice.<sup>2</sup>

Offences against this martial law are sometimes described as 'war crimes' — 'war treason' ('Kriegsverrath') is the favourite word of the Germans. These offences are usually specified in the proclamations issued by the occupant.<sup>3</sup>

Under recent practice the occupant has not infrequently retained the services of the local judges and public functionaries (other than political officials) for the general judicial and administrative work of the locality, in so far as it did not clash with his own interests for the time being. But he is not bound to retain them, nor is he entitled to compel them to remain in their posts. Thus, in the Franco-German War, 1870-1, the French municipal officials in the localities occupied by the Germans were permitted to retain their office if they were willing to do so, but the Government officials refused to remain in office. Similarly, in the Great War, the German occupying commanders usually allowed local authorities to continue to exercise their functions,<sup>4</sup> but recalcitrant officials were treated with the utmost rigour and in some cases were carried off and thrown into German prisons.

As a rule, the occupant's acts and the consequences of the law administered by him are legally binding, and may not, if affecting private persons and vested rights, be abrogated by the succeeding Government, *i.e.* the Government that manages eventually to expel the occupant by force, or replaces him at the treaty of peace. But this rule does not necessarily apply to acts that exceed the occupant's powers (*e.g.* alienation of

<sup>1</sup> The conduct of the German armies of occupation in the Great War will be long remembered for its extraordinary severity and unrestrained ferocity. Even slight offences were punished with death or long terms of penal servitude; and no heed was paid to age, or sex, or feebleness. Rigorous and cruel regulations were made, which were enforced in an arbitrary and arrogant manner. Cf. Phillipson, *Int. Law and the Great War*, pp. 218 *seq.*; and see the Bryce Report, and the official French and Belgian Reports.

<sup>2</sup> Cf. Bluntschli, *Völkerrecht*, §§ 542, 543, 546, 548.

<sup>3</sup> For examples in the Anglo-Boer War, see *Papers Relative to Martial Law in South Africa* (Cd. 981); in the Russo-Japanese War, see Ariga, *op. cit.* pp. 379 *seq.*; in the Great War, the various acts which were made crimes by the Germans in occupied territory are known to all.

<sup>4</sup> After the British occupation of the German island of Samoa in August, 1915, the existing officials were retained: *Parl. Papers*, 1915, Cd. 7972.



the domains of the state or the sovereign), to sentences for 'war treason' and 'war crimes,' to acts of a political character, and to those that operate beyond the period of occupation.<sup>1</sup> For all unlawful acts performed by the occupant the succeeding Government is entitled to reparation.

The various rules expressly laid down in the Hague Convention are in harmony with the above general principles.

Compulsory  
information.

Any compulsion of the population of occupied territory to furnish information about the army of the other belligerent or about his means of defence is forbidden.<sup>2</sup> This rule is an extension of Art. 23 (i), which prohibited the compulsion of enemy subjects to participate in the 'operations of war' against their own country. It has been doubted<sup>3</sup> whether the employment of forced guides is illegitimate under these provisions. But to give information about the position of the enemy and his vulnerable places is surely of no less consequence than to level a gun at him; it obviously comes within the meaning of 'operations of war'; therefore to compel local inhabitants to act as guides to the occupying army is unlawful.

Oath of  
fidelity.

Any pressure on the population of occupied territory to take the oath to the hostile power is prohibited.<sup>4</sup> But this rule does not forbid an occupant to demand an oath of fidelity—not an oath of allegiance in the proper sense of the term—from such officials as are willing to remain in office, provided the oath relates to the period of effective occupation and to duties which they may be rightfully called upon to fulfil. The administration of an oath of neutrality, however, is not illegal, inasmuch as it would not thrust new obligations on the inhabitants during the occupation. An oath of this character was administered in the Anglo-Boer War by both belligerents.<sup>5</sup>

Private  
rights and  
property.

Family honours and rights, individual lives and private property, as well as religious convictions and liberty, must be respected. Private property may not be confiscated.<sup>6</sup> But this prohibition must be taken to be without prejudice to the right to confiscate by way of punishment or under stress of military necessity:<sup>7</sup> 'by the prohibition of confiscation it is only meant that private property cannot by any regulation

<sup>1</sup> Wheaton (ed. Phillipson), pp. 529, 530.

<sup>2</sup> Art. 44. This Article has already been dealt with in its relation to Art.

23. See pp. 210, 212, *supra*.

<sup>3</sup> Cf. Holland, *Laws of War on Land* (1908), p. 53.

<sup>4</sup> Art. 45.

<sup>5</sup> Cf. *Proclamations of F.M. Lord Roberts* (Cd. 426), p. 23; Spaight, *op. cit.* p. 372.

<sup>6</sup> Art. 46.

<sup>7</sup> Westlake, Part II, p. 103.

of the invader be taken from its owner for no other reason than that he is an enemy.' Pillage is formally prohibited.<sup>1</sup> No war has been free from this practice; but in the Great War the German invaders despoiled owners of their property in a most iniquitous manner.<sup>2</sup>

If, in the territory occupied, the occupant collects the taxes, Taxes, etc. dues and tolls imposed for the benefit of the state, he shall do it as far as possible in accordance with the rules in existence and the assessment in force, and will, in consequence, be bound to defray the expenses of the administration of the occupied territory on the same scale as that by which the legitimate Government was bound.<sup>3</sup> If, besides the taxes mentioned in the preceding Article, the occupant levies other money contributions in the occupied territory, this can only be for the needs of the army or the administration of such territory.<sup>4</sup> It is clear that these provisions do not confer an express right on the occupant to collect the taxes, nor do they prohibit him from so doing. They only say that if he resolves to collect them, he must observe the restrictions specified. The words 'imposed for the benefit of the state' exclude imposts incidental to local government, which, however, the occupying commander may superintend in order to ensure that they are not utilised for hostile purposes. If any surplus remains after the due appropriation of the national revenue, it may be used for his own essential requirements. He may not impose new taxes or demand payment before it is due; but he need not adopt the previously existing mode of collection, if the officials of the former Government have fled or refuse to serve. If the ordinary national revenue is inadequate, he may resort to contributions and requisitions.

No general penalty, pecuniary or otherwise, can be inflicted General penalty. on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.<sup>5</sup>

No contribution shall be collected except under a written Contributions. order and on the responsibility of a Commander-in-Chief. This collection shall only take place, as far as possible, in accordance with the rules in existence, and the assessment of taxes in force. For every contribution a receipt shall be given to the payer.<sup>6</sup>

Neither requisitions in kind nor services may be demanded Requisitions. from communes or inhabitants, except for the necessities of

<sup>1</sup> Art. 47.

<sup>2</sup> See Phillipson, *op. cit.* pp. 162 *seq.*, 220, 229 *seq.*; and the Official Reports referred to.

<sup>3</sup> Art. 48.

<sup>4</sup> Art. 49.

<sup>5</sup> Art. 50.

<sup>6</sup> Art. 51.

the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country. These requisitions and services shall only be demanded on the authority of the Commander in the locality occupied. The supplies in kind shall, as far as possible, be paid for in ready money; if not, their receipt shall be acknowledged and the payment of the amount due shall be made as soon as possible.<sup>1</sup>

Usufruct.

The occupying state shall only be regarded as administrator and usufructuary of the public buildings, real property, forests and agricultural works belonging to the hostile state, and situated in the occupied territory. It must protect the capital of these properties, and administer it according to the rules of usufruct.<sup>2</sup>

An important point to be noted is the distinction maintained between taxes, contributions, fines and requisitions. The right of the occupant to levy the country's taxes is not admitted, though it is assumed that he will probably do so, and these taxes must be used for the expenses of local administration. Anything taken over and above the amount of the existing taxes is described as a 'contribution,' and must be proportionate to the needs of the army if not actually required for administration of the country; in other words, the invaded territory must not be made to pay indefinitely large sums to provide the invader with means for carrying on the war. This, however, is not to affect the power to inflict fines for offences, if the persons fined can reasonably be held responsible for the offence. Finally, requisitions in kind and services may take the place of contributions, but they must be limited to the necessities of the army of occupation and the resources of the locality; and it would seem to follow that this latter limitation also applies to contributions. The question of payment for these requisitions and services is in effect left to the invader, who will probably decide it on grounds of policy. It cannot be laid down as a rule either of principle or practice that either he, or the Government of the invaded country, is under any liability to pay; and the giving of a receipt is nothing more than a record of the transaction which will furnish a basis of calculation, whatever the ultimate settlement may be.<sup>3</sup>

<sup>1</sup> Art. 52. For examples of exorbitant contributions and requisitions demanded by the Germans in the Great War, see Phillipson, *op. cit.* pp. 235 *seq.*

<sup>2</sup> Art. 55.

<sup>3</sup> See Westlake, Part. II, pp. 107 *seq.*; Holland, *The Laws of War on Land*, § 111.



From this recognition of the right to contributions, requisitions and services, it would logically follow that a 'ransom' may be exacted from a locality as the price of immunity from invasion. On this point the Hague Conventions are silent; but the right seems to be established, though it has been rarely exercised, and presumably the ransom must bear some proportion to the loss which such contributions and the like would inflict upon the district. Ransom.

The degree in which the strict rights conferred by military occupation are enforced may be determined in practice by political considerations. When the war is one of conquest, it is important to the belligerent that he should not exasperate to desperation a people over whom he aspires to rule peacefully; if, on the other hand, the occupation is certain to be temporary, greater indifference may be expected to the resentment of the inhabitants. The German occupation of France in 1871 was attended by many practices of great severity, and some of undoubted illegality;<sup>1</sup> but the Germans of to-day have vastly surpassed these examples.<sup>2</sup> Law and policy.

It has been much discussed how far a belligerent is entitled to lay waste the territory of his enemy. It need hardly be said that devastation was a familiar incident of mediæval warfare. It was felt, however, at a relatively early period that the practice could only be justified by the strictest military necessity. Thus Evelyn in his *Memoirs*<sup>3</sup> says in 1694: 'Lord Berkeley burnt Dieppe and Havre in revenge for the defeat at Brest. This manner of levying war was begun by the French, and is exceedingly ruinous, especially falling on the poorer people, and does not seem to tend to make a more speedy end of the war, but rather to exasperate and incite to revenge.' Nearly a century later Vattel speaks with much greater certainty. Such acts are 'dreadful extremities when a nation is driven to them, barbarous and unspeakable excesses when done without necessity.'<sup>4</sup> It must be observed that even now occasions might easily arise sufficient to excuse devastation. The act of de Vendôme in cutting the dykes and flooding the country from Ghent to Ostend in order to cut Marlborough's communications was clearly within his belligerent rights. Devastation.

<sup>1</sup> See Phillipson, *op. cit.* pp. 146-147 (and the references there given), 230, 235, 238.

<sup>2</sup> A good many official publications have been issued on the subject in the Allied countries, but we need not refer to them here as they (and their contents) are known well enough.

<sup>3</sup> *iii.* 335, cited by Hall, p. 572n.

<sup>4</sup> *Liv. iii.* chap. ix, § 167.

The permissibility of a particular act may be determined by reference to two admitted principles which Professor Westlake<sup>1</sup> has well stated for a more general purpose:

- (1) Everything is prohibited which is not of a nature to contribute to success in the military operation concerned.
- (2) Even when a thing does not fall under any absolute prohibition, it may only be done in the circumstances, and in the measure, in which it may reasonably be expected to contribute to the success of the (military operation) concerned.

At the Hague<sup>2</sup> the general prohibition of the destruction of enemy property was qualified by the words 'unless such destruction be imperatively demanded by the necessities of war.' The German Manual expresses the rule by stating that no damage must be inflicted, not even the most trivial, that is not demanded by military necessity; and every damage, even the greatest, is permissible if it be demanded by belligerent operations or if it is a consequence of the due prosecution thereof. In any case, however, there can be no doubt that to destroy for the mere purpose of inflicting pecuniary loss is illegitimate; allegations of military necessity can never justify what is in fact gratuitous ravage. 'Necessity must be rationally construed. It must not be potential or prospective; it must, in order to operate as a justification, be direct and immediate.'<sup>3</sup> We need not discuss here whether the conversion of Belgian territory during the Great War into a desert and a slaughter-house was imperatively demanded by any rationally interpreted military necessity.<sup>4</sup>

#### Reprisals.

Reprisals and retorsion we have already dealt with in so far as they are pre-belligerent acts; but they may also be employed by way of punishment for breaches of the rules of war. The only reference to punishment in the Hague Conventions is, as we have seen,<sup>5</sup> in the words 'a belligerent party which violates the provisions of the said regulations, shall, if the case demands, be liable to make compensation'; and as no reference is made to reprisals, we are thrown back upon the general principle which applies to the whole of these regulations that 'in cases not included in the Regulations, populations and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established between civilised nations, from

<sup>1</sup> *Chapters on the Principles of International Law*, p. 236.

<sup>2</sup> Art. 23 (g).

<sup>3</sup> Wheaton (ed. Phillipson), p. 506.

<sup>4</sup> See *supra*, p. 242.

<sup>5</sup> See p. 197, Art. 3 of Convention IV of 1907.

the laws of humanity and the requirements of the public conscience.' <sup>1</sup>

Reprisals and retorsion, being as a rule the punishment of one man for the offence of another, are justly regarded as only a last resort in cases of absolute necessity.<sup>2</sup> They may be carried out by a breach of the same rule as the offender has broken, or of a different rule;<sup>3</sup> the punishment must be proportionate to the offence; and in general they should not be inconsistent with the fundamental principles of justice and humanity.<sup>4</sup> As Professor Westlake says, they must be justified as punishment only, and not on any such ground as that the breach by one party of the laws of war releases the other from his obligations.<sup>5</sup> During the Great War, owing to German violations of international law (*e.g.* the destruction of merchantmen), Orders in Council were issued, March 11, 1915, January 10, 1917, and February 16, 1917, empowering His Majesty to adopt retaliatory measures. The validity of the Orders of March 11, 1915, and February 16, 1917 (prescribing the restriction of enemy commerce), was affirmed by the Prize Court.<sup>6</sup>

The practice of taking hostages is another point not dealt with in the Hague Conventions, and it cannot therefore be treated as forbidden. They have been in practice seized either to ensure the payment of contributions and the like, or to secure the maintenance of order. It is agreed in principle that their lives are inviolable;<sup>7</sup> though this did not prevent the Germans in 1870 (and, for a short time, the British in South Africa <sup>8</sup>) from putting them on trains, in order to discourage the habit of train or bridge wrecking.<sup>9</sup> But this practice is virtually as unjustifiable as compelling inhabitants to serve as a shield to a marching column or to the firing line.<sup>10</sup> Moreover, it is important to note that members of belligerent

Hostages.

<sup>1</sup> Preamble to Convention II of 1899, and IV of 1907.

<sup>2</sup> Hall, p. 438.

<sup>3</sup> Westlake, Part II, pp. 123 *seq.*

<sup>4</sup> Cf. the rules of the Institute of International Law drawn up at Oxford, 1880, Arts. 85, 86: in *Annuaire*, vol. v, p. 174.

<sup>5</sup> Westlake, p. 126.

<sup>6</sup> *The Stigstad* (1916), 2 P.C. 179; *The Leonora and other vessels* (1918), 34 T.L.R. 366.

<sup>7</sup> As to the treatment of hostages in the Great War, see Phillipson, *op. cit.* pp. 238 *seq.*

<sup>8</sup> Cf. *Parl. Papers, Proclamations issued by F.M. Lord Roberts in South Africa* (Cd. 426), 1900, p. 11.

<sup>9</sup> Hall, p. 504.

<sup>10</sup> For instances of such practice in the Great War, see Phillipson, *op. cit.* pp. 195, 253, 254.



forces, even if proceeding singly, may lawfully wreck the enemy's trains and destroy bridges; accordingly arrested hostages would in such cases be made to suffer for the permissible acts of combatants. Though no specific provisions as to hostages are contained in written instruments, there can be no doubt that their arbitrary arrest, and the irrational presumption of vicarious responsibility as well as recourse to general terrorism, are contrary to 'the laws of humanity and the requirements of the public conscience' that are often emphasised in the Hague Conventions.

## CHAPTER V

### ENEMY PROPERTY ON THE SEA

THE private property of the enemy taken at sea is generally liable to capture and confiscation.<sup>1</sup> Continental and American writers have long sought to extend the comparative immunities of enemy property on land to this case also. 'Il est à désirer,' said Napoleon, 'qu'un temps vienne, où les mêmes idées libérales s'étendent sur la guerre de mer et que les armées navales de deux puissances puissent se battre sans donner lieu à la confiscation des navires marchands, et sans faire constituer prisonniers de guerre de simples matelots de commerce.'<sup>2</sup> The United States in 1823 urged the adoption of the principle of exemption, and in 1856 offered to give up privateering if the following provision were added to the Declaration of Paris: 'And the private property of the subjects or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the other belligerent, except it be contraband.' Austria and Italy acted on this principle during their war in 1866; and Prussia in 1870 announced her intention of adopting it, but finding France unwilling to agree, did not follow up her announcement. It is not seriously pretended that the existing law of nations forbids such capture; but it is claimed that 'the immunity would be universally recognised as another restraining and humanising influence imposed by modern civilisation upon the art of war.'<sup>3</sup> This proposition may be fully admitted without in any way exhausting the controversy.

Liabile to capture.

The real question at issue is whether the effect of maritime capture upon the event of hostilities is sufficiently direct and

<sup>1</sup> As to the capture of enemy goods on a British ship entering a British port in 1914, see *The Roumanian* (1914), 1 P.C. 75; (1915), 1 P.C. 536, when the Privy Council said (at p. 546): 'Enemy goods on British ships, whether on board at the commencement of the hostilities or embarked during the hostilities, were always and still are liable to be seized as prize, either on the high seas or in the ports or harbours of the realm.' Cf. also *The Aldworth* (1914), 31 T.L.R. 36 (enemy goods on a British vessel); *The Schlesien* (No. 2) (1916), 2 P.C. 268 (enemy goods on an enemy vessel).

<sup>2</sup> *Mémoires*, t. iii, chap. vi, cited Halleck, vol. ii (1908), p. 97.

<sup>3</sup> The American Secretary of State to Baron Gerolt in 1870, cited by Hall, 7th ed. p. 467.

decisive to bring it within the protection of recognised principles. To argue that private property is immune on land and should therefore be immune on the sea, is misleading. Maritime capture is marked by little of the bloodshed and violence which are inseparable from such seizure on land; the objects of capture are almost always directly contributory to the enemy's strength, and, by means of insurance, the loss is distributed among the whole community. Any ship may become an instrument of war, if not for actual fighting, at any rate for purposes of transport or invasion. Unlike the owner of property on land, the owner of property on the sea has ventured it, knowing the risk and in the hope of gain; and even in the case of property on land it is inaccurate to say that there is immunity from capture, for in the words of Wheaton:<sup>1</sup> 'An invader on land can levy contributions or a war indemnity from a vanquished country, he can occupy part of its territory and appropriate its rates and taxes, and by these and other methods he can enfeeble the enemy and terminate the war. But in a maritime war, a belligerent has none of these resources, and his main instrument of coercion is crippling the enemy's commerce. If war at sea were to be restricted to the naval forces, a country possessing a powerful fleet would have very little advantage over a country with a small fleet or with none at all. If the enemy kept his ships of war in port, a powerful fleet, being unable to operate against commerce, would have little or no occupation.' To which may be added that the confiscation of property on the sea is accompanied and regulated by an inquiry with all the forms of law, such as never takes place in the case of requisitions and contributions on land.

The right of capture may therefore be defended as a means of reducing the enemy and as a measure of military necessity; nor can it reasonably be attacked as inhumane. It is indeed less open to this charge than many other measures the legality of which is undisputed.

The recent history<sup>2</sup> of the question has done nothing to throw any doubt upon the right, whatever may have been done in the way of inclining opinion towards an admission

Recent  
history.

<sup>1</sup> (Ed. Phillipson), pp. 569, 570. This passage must now be read subject to the rules agreed to at the Hague; see p. 245, *supra*.

<sup>2</sup> Cf. Lawrence, *Principles*, 4th ed. pp. 494 *seq.*; Hall, 7th ed. pp. 466 *seq.*; Mr. Justice Kennedy, *The Exemption of Private Property at Sea from Capture in Time of War* (a paper read before the International Law Association, Oct. 1906 (London, 1906); H. Wehberg, *Capture in War on Land and Sea* (London, 1913).



of the desirability of a change in the law. The United States, as we have seen, has long been in favour of the change, and the great body of opinion among continental jurists agrees with the American view, which was again put forward at the Hague in 1899. The Conference, however, did not consider itself empowered to deal with the question, and expressed a 'wish' that it be referred to a subsequent Conference.<sup>1</sup> The United States brought the proposal forward again in 1907.<sup>2</sup> Certain alternatives were suggested—sequestration instead of capture, exemption on a certificate from the state that the vessel would not be used as a warship, and the abolition of the system of prize money—but no agreement was possible, mainly by reason of the opposition of Great Britain,<sup>3</sup> though France, Japan and Russia were among the states which took the same view. Great Britain was, however, prepared to agree to the total abolition of the right of capturing contraband, but on this no approach to unanimity was possible.<sup>4</sup> The 'wish' of 1899 was replaced by a much vaguer wish 'that the preparation of regulations relative to the laws and customs of naval war should figure in the programme of the next Conference, and that in any case the powers may apply, as far as possible, to war by sea the principles of the Convention relative to the laws and customs of war on land.' As private property can hardly be said to be exempt on land, even legislation by analogy would not exempt it on the sea; and some difficulty would be experienced in finding analogies to contributions and requisitions.

It is of course a different question and one not properly within the scope of this book, whether the interest of a particular country is best secured by the retention or abolition of the practice. But as the opposition of Great Britain is undoubtedly the great obstacle to a change, it is well worth considering how far this country gains by the existing practice. The main arguments on the one side and the other may be briefly summarised as follows:—In favour of the change<sup>5</sup> it has been urged (apart from the argument based on humanity):—

(1) That the pressure which can be put upon a continental enemy by destroying his sea-borne commerce is of compar-

The policy of exemption.

Arguments for immunity.

<sup>1</sup> *Vœu* 5 of 1899.

<sup>2</sup> For the deliberations at the Hague, see *Parl. Papers, Misc.* No 1 (1908), p. 187; the official report, *La Deuxième Conférence*, i, 245; iii, 746-812.

<sup>3</sup> The British view is stated in *Parl. Papers, Misc.* No. 1 (1908), p. 15.

<sup>4</sup> See Part IV, chap. iv, *infra*.

<sup>5</sup> Cf. Sir J. Macdonell, *Some Plain Reasons for Immunity*, etc. (London, 1910).

tively little importance now that the development of railway systems enables him to trade and get his supplies overland, and the Declaration of Paris enables him to ship his goods with safety in neutral vessels, except in the case of contraband, and that this argument will be stronger still if the Declaration of London is ratified and the doctrine of continuous voyage in relation to conditional contraband is abolished.<sup>1</sup>

(2) That experience has shown that the loss inflicted even under the present system, while a hardship to private individuals, was so small in proportion to a nation's total over-sea trade as to involve very slight pressure upon that nation as a whole, whereas to Great Britain, if she lost command of the sea, it would probably be fatal. (This argument, however, no longer holds good in view of the experience in the Great War, when, owing to submarine warfare, the unparalleled destruction of mercantile shipping became a serious menace to the economic existence of the states affected.)

(3) That Great Britain, depending to an enormous extent upon imported supplies, and earning enormous profits by her carrying trade, would stand to gain in a corresponding degree if those supplies and that trade could remain uninterrupted by the operations of enemy cruisers.<sup>2</sup>

(4) That the effect of capture in bringing pressure to bear which will reduce the enemy to submission is much modified by the system of insurance.

(5) That all neutrals will gain by the freedom from the inconvenience, delay and loss occasioned by the capture, and, in many cases, destruction of enemy vessels in which their goods are carried.

(6) That the result of the present system would be the transfer to neutral shipowners of the greater part of Great Britain's carrying trade, which once lost would never, or only after a long interval, come back; and

(7) That the proposed immunity would be an important step towards an agreement for the reduction of naval armaments, one of the main justifications put forward for large navies being the defence of the mercantile marine.

Arguments  
against  
immunity.

Against the proposed change it is urged:—

(1) That exemption leads logically to the abolition of commercial blockade, and that unless such blockade is abolished, there will be constant disputes, resulting in the power which

<sup>1</sup> See Part IV, chap. iv, *infra*, especially pp. 348 *seq.*

<sup>2</sup> See Sir Robert Reid's (now Lord Loreburn) letter to *The Times*, October 14, 1905; reprinted, with introduction and notes by F. W. Hirst (1906).

alleges itself to be aggrieved falling back upon the old principle of indiscriminate capture;<sup>1</sup> though this argument would lose some of its strength if the rules of the Declaration of London as to blockade were ratified and honourably observed.<sup>2</sup>

(2) That it is by her navy alone that Great Britain can bring pressure to bear upon a continental enemy; that it is only by capturing or driving from the sea all enemy merchant vessels that such pressure can be made effective, and that by giving up this right, Great Britain, in the words of Lord Palmerston, 'would be inflicting a fatal blow upon her naval power and would be guilty of an act of political suicide.'

(3) That there will be little consolation to a nation whose mercantile marine is paralysed in the fact that it has neutrals to rely upon, and that its supplies can, at great inconvenience and great expense, be brought by train, even if the train service is equal to the task.

(4) That the risk to Great Britain of losing her carrying trade to neutral rivals is comparatively slight; for the British trade is so large that neutrals could not possibly undertake it, and the genuine sale of British ships to neutral buyers on so large a scale would be impossible, even if the validity of such sales were recognised by the enemy, which is doubtful; and in any case the ships so transferred would be taken in for adjudication, so that the enterprise, to the neutral, would not be worth the trouble and expense, even though he succeeded in establishing the *bona fides* of the transfer.

(5) That the risk to British trade is greatly over-estimated: the Commission of Food Supply in Time of War in 1905<sup>3</sup> reported that so long as Great Britain retained command of the sea there was no reasonable probability of a serious interference with her food supplies, though undoubtedly the price would rise. It is pointed out by opponents of the change that in any event this would probably happen, so long as the doctrines of contraband and blockade are liable to be strained, as they probably would be, by any power in a war against Great Britain; while, if Great Britain lost command of the sea, it is difficult to imagine a victorious enemy standing by and allowing her trade to go on and her food supplies to come in as if nothing had happened. It is true that the rules as to blockade and contraband are fairly definite and generally accepted; but it is necessary to guard not only against opera-

<sup>1</sup> See Sir Edward Grey's instructions to the British delegates in 1907, *Parl. Papers, Misc. No. 1* (1908), p. 15; and Hall, 7th ed. p. 472.

<sup>2</sup> See Part IV, chap. v, *infra*, pp. 367 *seq.*

<sup>3</sup> Cd. 2643, p. 59.



tions permitted by, but also against violations of, international law.<sup>1</sup> It is urged, too, that under modern conditions a repetition of the exploits of the *Alabama* is highly improbable; steam warships cannot remain at sea for the length of time necessary, but must be within a short distance of a coaling station, and are therefore more easy to locate and attack; they cannot with the same facility as sailing ships spare men for prize crews (though they may, without violating any rule of international law, destroy their enemy prizes<sup>2</sup> if they can find room on board for the captured crew); and their prey, being themselves for the most part steamships, can, with the assistance of wireless telegraphy, more easily avoid them. Even the *Alabama* with all her advantages—her steam power being assisted by sail—only made prizes at the rate of three per month; ‘and the enormous moral effect which she (and the other Confederate cruisers) caused, would have been comparatively insignificant against a steam trade.’<sup>3</sup>

(6) That while the change would relieve those nations which have only a single coast-line to defend, it would do little to lighten the burden of the naval defence of the British Empire; though against this it must be remembered that it might render unnecessary excessive building against building by other powers.

An extreme view taken in certain quarters is that the provision in the Declaration of Paris that the neutral flag covers enemy goods was from the British point of view a mistake, and ought to be repudiated: a proposition which savours of international hooliganism, and is not likely to be seriously entertained in any responsible quarter. It would, among other things, involve the repudiation by all other powers of the rule against privateering and the rule against paper blockade, for the four rules of the Declaration were expressly agreed to be indivisible.<sup>4</sup>

It is obvious, then, that the question of policy is one of serious difficulty, and underlying the opposition to the change there is, unfortunately, but it may be, justifiably, a doubt as to the security that in case of war the new rule of immunity would be observed by an enemy who succeeded in obtaining the command of the sea. In the event of a disaster of that kind, it would probably in practice be found to matter little whether private property were agreed to be exempt from

<sup>1</sup> See *The Report of the Commission on the supply of food and raw material in time of war*, pp. 25, 26.

<sup>2</sup> See Part IV, chap. ix, *infra*, pp. 419 *seq.*

<sup>3</sup> *The Report of the Commission on Supply*, etc., pp. 28, 29.

<sup>4</sup> See *infra*, p. 412.

capture or not; and it will be for experts to decide whether the advantages which would accrue from the change before that disaster took place would not be worth having, even though under the strain of extreme necessity the protection afforded by immunity from capture should prove illusory.<sup>1</sup>

The question of the destruction of prizes involves consideration not only of the rights of belligerents but of the rights of neutrals. It was fully dealt with by the Naval Conference of London in 1908-9, and an examination of it will be more conveniently made in the chapters relating to neutrality, in which the results of that Conference are set out.<sup>2</sup>

Destruction of prizes.

There are certain special exceptions to the rule that enemy property may be seized.

Exemptions from capture.

Private non-contraband property belonging to the enemy and carried in neutral ships is now immune from capture. (But the carriage of goods in a vessel belonging to a subject of the captor Government does not confer immunity.)<sup>3</sup> The conditions of the immunity will be dealt with under the head of neutrality.

Free ships, free goods.

The immunity of cartel ships<sup>4</sup> and of hospital ships<sup>5</sup> has already been mentioned.

A custom of long standing, which exempted vessels charged with religious, scientific or philanthropic missions, was embodied in Art. 4 of Convention XI of 1907. The immunity is, of course, subject to the condition that the vessels in question will strictly observe their innocent character, and refrain from aiding the belligerent or participating in military or naval operations. It is usual for such vessels to obtain a safe-conduct from the enemy Government, though the Convention does not require it. In 1801, during the war between England and France, Flinders, intending to circumnavigate Australia, obtained a safe-conduct from the French Government. At Sydney he exchanged his vessel, the *Investigator*, which had been found unseaworthy, for the *Cumberland*. But in 1803

Vessels charged with religious missions, etc.

<sup>1</sup> See on the subject, Hall, 7th ed. p. 471; Westlake, Part II, pp. 147 seq.; Cobbett, *Cases*, vol. ii (1913), pp. 134 seq.; a useful summary of the arguments for the existing principle in A. Latifi, *Effects of War on Property* (1909), p. 117; and a paper (published by the Eighty Club) written by the Right Hon. Arthur Cohen, K.C. *Sea Law and Sea Power* (London, 1910), by T. Gibson Bowles, contains a vigorous statement of the case against exemption. See also the references given *supra*, pp. 256, n. 2, 257, n. 5.

<sup>2</sup> See Part IV, chap. ix, *infra*, pp. 419 seq.

<sup>3</sup> *The Miramichi* (1914), 1 P.C. 137; *The Roumanian* (1915), 1 P.C. 137. See *infra*, p. 412.

<sup>4</sup> See p. 239, *supra*.

<sup>5</sup> See p. 234, *supra*.

the latter was seized and he and his crew were made prisoners of war at Port Louis in Mauritius (then a French colony), on the ground that she was not the vessel to which a safe-conduct had been granted, and that she had entered Port Louis in suspicious circumstances. Flinders was released on parole in 1810; and in the same year the British took Mauritius and recaptured the vessel.<sup>1</sup> A case that occurred in 1915 illustrates the application of Art. 4. The *Paklat*, a German steamer, which had been ordered by the Governor of Tsing-tao to take the women and children from there to Tientsin before the siege of Tsing-tao began, was seized by British cruisers. Germany held that the vessel was entrusted with a humanitarian mission, and hence was free from capture. But Sir Edward Grey replied that the Article did not apply to the case in question, which was made clear in the official report of the Hague Conference:<sup>2</sup> 'In the view of His Majesty's Government the conveyance of women and children from a fortress which was about to be besieged (an action which would have the effect of increasing the power of resistance of the fortress) cannot be regarded as a philanthropic mission within the meaning of the Article; and it would indeed appear that the *Paklat* might more properly be considered as being employed on a service connected with the operations of war.' Sir Edward Grey added that the protest was all the more astonishing in that a German submarine torpedoed, without notice, the French vessel *Amiral Ganteaume*, which was taking refugees to England.

Coast  
fisheries.

By Art. 3 of the same Convention a similar immunity was granted to vessels exclusively used in coast fisheries, and to 'small boats engaged in local trade,'<sup>3</sup> as well as to their rigging, tackle and cargo; the exemption ceasing from the moment that they take any part whatever in hostilities. The contracting powers bound themselves not to profit from the harmless character of these vessels by employing them for military uses, while preserving their peaceful appearance. The previous practice with regard to coast fishing-vessels (deep-sea fishers

<sup>1</sup> See M. Flinders, *Voyage to Terra Australis*, vol. ii, chaps. iii seq.

<sup>2</sup> Cf. Sub-Annexe 10 to Protocol of the Seventh Plenary Meeting. On April 15, 1915, the Hong-Kong Prize Court decided that an enemy vessel conveying women and children fugitives from an enemy naval and military base, a blockade of which is expected, is not 'employed on a philanthropic mission' within the meaning of Art. 4 of the eleventh Convention: *The Paklat* (1915), 1 P.C. 515.

<sup>3</sup> In 1915 the Prize Court sitting at Alexandria pointed out that, apart from the Convention, there is no customary rule of international law that protects from capture small coasting vessels engaged in general local trade: *The Maria* (1915), 1 P.C. 259.



were never regarded as exempt) had been uncertain, Great Britain<sup>1</sup> granting the exemption, as a rule, as a matter of grace, and withholding it when, as in 1800, they were employed by the French as fire vessels and privateers.<sup>2</sup> It may be noted as matter for criticism that no definition of 'coast fisheries' or 'small boats engaged in local trade' was attempted;<sup>3</sup> and, indeed, a certain vagueness on these points was inevitable. No doubt the expression 'coast fisheries' applies not merely to the coasts of the fishermen's own country, but to any coast where they are permitted to pursue their industry. On the other hand, 'small boats engaged in local trade' cannot be said to include coasting steamers. In 1914 the *Berlin*,<sup>4</sup> a German sailing cutter, carrying a cargo of fish and materials for curing, was seized by a British cruiser some 500 miles from her home port and about 80 miles from the coast of Scotland. Her condemnation was demanded on the ground of her size and her distance from the coast. The President of the Prize Court said, in the course of his judgment, that it had become an established rule in the last hundred years to exempt from capture fishing vessels engaged in their industry near the coast—not necessarily in territorial waters—if they honestly followed their ostensible employment. But the *Berlin* did not conform to this requirement: her size, equipment and voyage showed she was a deep-sea fishing vessel, engaged in a commercial enterprise forming part of the enemy trade; and therefore both she and her cargo were condemned.

More important was the rule laid down with regard to postal correspondence.<sup>5</sup> Formerly, states sometimes concluded special conventions conferring immunity on each other's mail boats in time of war; with the proviso, however, that the contracting parties could renounce their engagement by giving notice. It was thus generally felt that a more definite and lasting provision was necessary for the protection of overseas correspondence. Accordingly at the Hague Conference it was agreed, on the motion of Germany, that 'the postal correspondence of neutrals or belligerents, whatever its official or

<sup>1</sup> Also the United States; see *The Paquete Habana* (1899), 175 U.S. Rep. 677.

<sup>2</sup> Hall, 7th ed. pp. 474 *seq.*; Pearce Higgins, *The Hague Peace Conferences*, p. 403; Westlake, Part II, pp. 155 *seq.*

<sup>3</sup> It has been decided by the Prize Court for Egypt that the expression does not cover harbour tugs and lighters: *Floating Craft of the Deutsches Köhlen-Depôt, Port Said* (1916), 2 P.C. 439; also by the Jamaica Prize Court: *The Atlas and Lighters* (1916), 2 P.C. 470.

<sup>4</sup> *The Berlin* (1914), 31 T.L.R. 38; 1 P.C. 29.

<sup>5</sup> Convention XI of 1907, Arts. 1 and 2; ratified by Great Britain, Nov. 1909.

private character,<sup>1</sup> found on board a neutral or enemy ship on the high seas is inviolable.<sup>2</sup> If the ship is detained, the correspondence is forwarded by the captor with the least possible delay.' Correspondence with a blockaded port was excepted; and it was provided that 'the inviolability of postal correspondence does not exempt a neutral mail ship from the laws and customs of naval war respecting neutral merchant ships in general. The ship, however, may not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible.'<sup>3</sup> This immunity is conferred only on correspondence found on vessels at sea, and not on that found on vessels that voluntarily enter a belligerent port—for such entrance subjects them to the local jurisdiction.<sup>4</sup>

The importance of a punctual and uninterrupted postal service to neutrals and to the non-combatant members of belligerent states has long been recognised as giving to mail boats and their mails a claim to special treatment. The subject comes in the main more properly under the head of 'Unneutral Service';<sup>5</sup> but it is important to note here that the immunity from capture or search generally allowed to mail bags on neutral vessels is extended to those found even on enemy vessels, and it is not even laid down as a condition that the vessel must be a regular mail boat. Probably only regular postal correspondence was intended; it can hardly be supposed that the intention was to exempt official correspondence specially put on board an enemy vessel not accustomed to carrying letters. Such a vessel would probably be held guilty of 'unneutral service.'

The privilege granted even to official correspondence is very wide. It is, on the face of it, somewhat remarkable that a belligerent must allow to pass, or (if the ship is detained) actually forward,<sup>6</sup> correspondence to or from his enemy's Govern-

<sup>1</sup> This is the official translation: but the French original is 'quel que soit son caractère officiel ou privé,' which would seem to be more properly translated, 'whatever its character, official or private,' or 'whether its character be official or private.'

<sup>2</sup> This immunity does not apply to parcels forwarded by parcel post: *The Simla* (1915), 1 P.C. 281; nor to negotiable instruments and securities representing money.

<sup>3</sup> Art. 2.

<sup>4</sup> Cf. *U.S. v. Diekelman* (1875), 92 U.S. Rep. 520.

<sup>5</sup> See Part IV, chap. vi, *infra*, pp. 396 *seq.*

<sup>6</sup> He must, it would seem, make his own arrangements for forwarding it: a rule which was not observed by the *Smolensk* which, in 1904, took mails out of a German vessel and then stopped a P. & O. vessel, and put them on board her for conveyance to their destination. There can be no right to stop a neutral vessel for any such purpose (see Pearce Higgins, p. 402).

ment departments. The German delegate, in supporting his proposal, argued that it was hardly possible that belligerents, having telegraphs and wireless telegraphy at their disposal, would use the ordinary mails for official military communications; so that the disadvantage to a belligerent of being forbidden to open, examine and delay mail-bags would be slight, compared with the consequent advantage to neutrals and non-combatants in securing a regular and punctual service. It may be added that, owing to the ease with which dispatches may be made to bear the appearance of private letters, or carried by individuals, and any attempt to seize them evaded, the right of seizing them is in practice of little if any value. Great Britain has already treaties with the United States and France protecting the mail steamers of the contracting powers in case of war between them, and, in fact, the immunity was granted during the Spanish-American War and the Boer War.<sup>1</sup> It is clear, then, that immunity to all mails was intended as being called for by the balance of convenience, for otherwise every mail-bag would be searched; though if a belligerent sends, by one of his own, or a neutral, mail boat, military dispatches which are, on the capture of the vessel (if his own), or its search (if neutral), discovered and seized without any interference with or delay to the vessel's ordinary mails, he will have little, if any, ground for complaint.

The Conference was not able to exempt from visit and search the mail boats themselves. If of belligerent nationality, they are still liable to capture; if neutral, they are still liable to visit and search, but their liability is reduced to the narrowest possible limits.

During the Great War, Great Britain and France examined the mails on neutral mail boats plying between Germany and Austria and neutral countries, on the ground that the German and Austrian authorities took advantage of the immunity conferred on postal correspondence, by including therein securities, contraband articles, and propagandist pamphlets intended for distribution.<sup>2</sup> In one case, for example, three Dutch steamships were found to be carrying nearly 3000 parcels of rubber sent by letter post from Brazil to Hamburg.<sup>3</sup> It may be added, further, that though Great Britain ratified the Eleventh Hague Convention of 1907 in November, 1909,

<sup>1</sup> See Pearce Higgins, p. 401.

<sup>2</sup> Cf. *Parl. Papers, Misc.* No. 9 (1916); *Misc.* No. 2 (1917); Hall, 7th ed. pp. 744 seq.

<sup>3</sup> *The Tubantia*; *The Gelvia*; and *The Hollandia* (1916), 32 T.L.R. 329; the rubber was condemned as contraband.



several of the belligerents have not done so; so that it is doubtful whether it possesses legal validity <sup>1</sup>—at all events, Germany has denied its obligatory character.

Changes of  
nationality.

It is often important to determine the ownership of property captured at sea, for its nationality, and therefore its liability to capture, is involved therein. Usually in peace the master of the ship is treated as the agent of the consignee, so that the property vests in the consignee on delivery to the master; but the goods may be shipped at the consignor's risk, and in that case the ownership during the voyage remains in him. During or just before war, however, there cannot be the same freedom of contract. Lord Stowell, in *The Packet de Bilbao*,<sup>2</sup> said: 'In times of profound peace, when there is no prospect of approaching war, there would unquestionably be nothing illegal in contracting that the whole risk should fall on the consignor till the goods came into the possession of the consignee. In time of peace they may divide their risk as they please, and nobody has a right to say they shall not. . . . In time of war this cannot be permitted, for it would at once put an end to all captures at sea; the risk would in all cases be laid on the consignor, when it suited the purpose of protection. . . . (The captor) having all the rights that belong to his enemy, is authorised to have his taking possession considered as equivalent to an actual delivery to his enemy; and the shipper who put it on board during a time of war must be presumed to know the rule.'

The beginning of the voyage is the critical date, whether the enemy is the consignee or the consignor. In *The Josephine* <sup>3</sup> it was held that silver consigned by an enemy shipper to his agent in Hamburg, for the purpose of meeting drafts of a correspondent in America, without any letter of advice putting it out of his control, must be treated as the property of the shipper. In *The Miramichi*, decided during the Great War, goods were shipped by a neutral seller to an enemy buyer on a British vessel, before the outbreak of the war, though not in anticipation of it, and were seized on their way to the enemy. It was held that the test for condemnation was as to whether the property in the goods had at the time of seizure passed to the enemy; but, as the buyers had refused to accept the necessary documents, the ownership was not transferred to

<sup>1</sup> Cf. Art. 12 of the Convention.

<sup>2</sup> (1799), 2 C. Rob. 133.

<sup>3</sup> (1801), 4 C. Rob. 25.

them, so that the goods were ordered to be restored to the sellers.<sup>1</sup>

The courts of the captor do not recognise claims against captured vessels or cargoes which would have been effective as against the original owners. In our legal phrase, the goods are acquired free from equities. Thus in *The Marianna*<sup>2</sup> it was held that a claim cannot in a Prize Court be founded upon a lien on freight for the payment of the purchase price of a vessel. Similarly, in *The Tobago*,<sup>3</sup> it was held that bottomry<sup>4</sup> on an enemy's ship is not an interest that can support a claim in a Prize Court on behalf of the bond-holder. And during the Great War it was held in *The Marie Glaeser* that the various classes of claimants—shareholders, mortgagees and persons claiming for brokerage and necessities—had no rights in the Prize Court in respect of the vessel.<sup>5</sup>

Claims  
against  
captured  
vessels

Property which has been purchased by a neutral in good faith becomes of course neutral; and, save in the case of ships, little difficulty can arise on the point. But with ships the matter is more complicated. Enemy goods are not liable to capture unless found in an enemy vessel; but an enemy vessel is liable to capture in all circumstances. There is, therefore, a strong temptation to the subjects of a belligerent state to make a colourable transfer of their shipping to neutrals during or in contemplation of a war; and against this evasion of the liability to capture it is admitted that belligerents have a right to protect themselves. The old French rule was that any sale of a ship by an enemy subject to a neutral was invalid if made after, and if the buyer could have had knowledge of, the outbreak of war; and this principle was maintained by France in the Memorandum laid by her before the Conference of London,<sup>6</sup> but was then abandoned in favour of rules more in accordance with those followed by Great Britain.

Transfer of  
ships.

Great Britain being more largely interested in shipbuilding and ship-selling has always laid stress upon the argument

British  
cases.

<sup>1</sup> *The Miramichi* (1914), 1 P.C. 137. Cf. *The Parchim* (1917), 2 P.C. 489 (the Privy Council approving the decision in the latter case, and following the same rule adopted by the Council in *The Odessa* (1915), 1 P.C. 554).

<sup>2</sup> (1805), 6 C. Rob. 24.

<sup>3</sup> (1804), 5 C. Rob. 218.

<sup>4</sup> 'Bottomry is a species of mortgage or hypothecation of a ship, by which her keel or bottom is pledged (*partem pro toto*) as a security for the repayment of a sum of money' (Wharton, *Law Lexicon*).

<sup>5</sup> *The Marie Glaeser* (1914), 1 P.C. 38. Cf. *The Aina* (1854), Spinks, 8; *The Carlos F. Roses* (1899), 177 U.S. Rep. 655. See further *infra*, p. 276.

<sup>6</sup> For details as to this Conference, see Part IV, chap. iii, *infra*. The rules agreed to by it as to transfer of vessels may conveniently be dealt with here. It must, however, be remembered that the Declaration of London was not ratified, and is not *per se* binding.

that the trade in ships is like any other trade; and that the assignment of a ship to a neutral (other than a ship of war <sup>1</sup>) is not in principle invalid merely because it takes place during or in contemplation of a war. In *The Ariel* <sup>2</sup> it was held that 'the sale of a ship, absolutely and *bona fide*, by an enemy to a neutral, *imminente bello* or even *flagrante bello*, is not illegal,' nor is such a vessel necessarily condemned, even though part of the purchase money remains unpaid. But as Lord Stowell observed in *The Sechs Geschwistern*,<sup>3</sup> the circumstances will be jealously examined: 'The rule which this country has been content to apply is that property so transferred must be *bona fide* and absolutely transferred; that there must be a sale divesting the enemy of all further interest in it; and that anything tending to continue his interest vitiates a contract of this description altogether.'<sup>4</sup>

Such an assignment is, by British decisions, invalid if made in a blockaded port,<sup>5</sup> or in the course of a voyage, before the ship has actually been delivered to the neutral buyer;<sup>6</sup> and the ship is liable to condemnation if there are grounds for suspicion not satisfactorily explained, such, for instance, as the absence of documentary evidence of transfer on board, the retention of control or power of revocation by the transferor, or the like.<sup>7</sup>

Declaration  
of London.

In the Memoranda presented by the powers at the Conference of London, Russia and Germany took the French view, and the Netherlands was in favour of unrestricted permission to transfer even in the course of a war; while the rest of the powers put forward with variations the British principle, which was the mean between these two extremes. An agreement was, however, reached, which was embodied in the following Articles:—

'The transfer of an enemy vessel to a neutral flag effected

<sup>1</sup> *The Baltica* (1857), 11 Moore, P.C. 141. *The Minerva* (1807), 6 C. Rob. 396.

<sup>2</sup> (1857), 11 Moore, P.C. 119. Cf. also *The Baltica*, *supra*; in which case, though the vessel was sold *in transitu*, the *transitus* had ceased and the vessel had come into the hands of the purchaser before she was captured. Cf. also *The Benedict* (1855), Spinks, 314; *The Minerva* (1807), 6 C. Rob. 396.

<sup>3</sup> (1801), 4 C. Rob. 100.

<sup>4</sup> Cited in *The Ariel* (*supra*) at p. 132.

<sup>5</sup> *The General Hamilton* (1805), 6 C. Rob. 62.

<sup>6</sup> *The Baltica* (1857), 11 Moore, P.C. 141; *The Danckebaar Africaan* (1798), 1 C. Rob. 112; *The Vrow Margaretha* (1799), 1 C. Rob. 336; *The Jan Frederick* (1804), 5 C. Rob. 128.

<sup>7</sup> *The Vigilantia* (1798), 1 C. Rob. 1; *The Endraught* (1798), 1 C. Rob. 19; *The Welvaart* (1799), 1 C. Rob. 122; *The Juffrouw Anna* (1799), 1 C. Rob. 124; *The Noydt Gedacht* (1799), 2 C. Rob. 137n.; *The Jemmy* (1801), 4 C. Rob. 31; *The Soglasie* (1854), Spinks, 105; *The Ernst Merck* (1854), Spinks, 99; *The Ariel* (1857), 11 Moore, P.C. 119; *The Christine* (1854), Spinks, 82; *The St. Tudno* (1916), 2 P.C. 272.



before the outbreak of hostilities is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, a presumption, if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the outbreak of hostilities, that the transfer is void. This presumption may be rebutted. Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid, if it is unconditional, complete and in conformity with the laws of the countries concerned, and if its effect is such that neither the control of, nor the profits arising from the employment of, the vessel remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities, and if the bill of sale is not on board, the capture of the vessel gives no right to damages.' (Art. 55.)

'The transfer of an enemy vessel to a neutral flag, effected after the outbreak of hostilities, is void, unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.

'There is however an absolute presumption that a transfer is void:—

(1) If the transfer has been made during a voyage or in a blockaded port.

(2) If a right to repurchase or to recover the vessel is reserved to the vendor.

(3) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing, have not been fulfilled.' (Art. 56.)<sup>1</sup>

The effect of these provisions, which were substantially in accordance with the British contentions, may be summarised as follows:—

The general principle is that a *bona fide* transfer is valid, made either before or after the outbreak of war.

<sup>1</sup>See *The Tommi*; *The Rothersand* (1914), 1 P.C. 16; *The Dacia* (1915) (decided by the French Prize Council), *Journal Officiel*, Aug. 26, 1915; *Amer. Journ. of Int. Law*, vol. ix (1915), p. 1015 (English trans.). Cf. *The Colonia* (1915), *Journal Officiel*, June 15, 1915.

*Bona fide* means, not made in order to evade the consequences of a war.

A. In the case of a transfer before the outbreak of war, the onus of proving *mala fides* is on the captor.

i. But a vessel transferred more than thirty days before is irrebuttably presumed to have been transferred *bona fide*, if the transfer was unconditional, complete, legal and without retention of control or profits by the transferor.

ii. A vessel transferred less than thirty days before may, even if the above conditions are satisfied, still be proved by the captor to have been transferred *mala fide*, *i.e.* in order to evade the consequences of the war.

iii. A vessel transferred less than sixty days before loses the presumption in her favour if she does not carry her bill of sale on board, and must prove her own *bona fides*, in addition to satisfying the above conditions; and in any event is entitled to no damages.

B. In the case of a transfer after the outbreak of war,

The onus of proving *bona fides* is upon the vessel.

In three cases the presumption of *mala fides* is irrebuttable:—

*a.* If transfer is made during voyage or in a blockaded port.

*b.* If a right of repurchase or recovery is reserved.

*c.* If the formalities of transfer are not observed.

It is to be noted that an attempt was made to include among the circumstances raising an absolute presumption of invalidity the fact that the vessel after the transfer continued in the same trade and on the same route as before. The attempt, however, was unsuccessful, and this case was intentionally omitted; so that such circumstances, though raising suspicion, will not be held conclusive against the vessel.

Enemy  
character.

In connection with this branch of the subject, it is important to consider the rules by which it is to be determined whether goods or ships have an enemy or a neutral character. By the Declaration of Paris the 'neutral flag covers enemy goods with the exception of contraband of war,' and 'neutral goods, with the exception of contraband of war, are not liable to capture on board an enemy ship.' So far, therefore, as

goods are concerned, the question only arises when they are found on board an enemy ship.

The case of ships is comparatively simple, and at the Conference of London the principle was agreed to without difficulty and embodied in Art. 57<sup>1</sup>:—

'Subject to the provisions respecting transfer to another flag, the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly.'<sup>2</sup>

'The case where a neutral vessel is engaged in a trade which is closed in time of peace remains outside the scope of, and is in nowise affected by, this rule.'<sup>3</sup>

By the last paragraph of this Article all questions connected with the Rule of the war of 1756,<sup>4</sup> which we deal with elsewhere, were expressly reserved, there being no unanimity on the subject at the Conference; and the result of the first paragraph is to establish a simple rule that a vessel's nationality is determined by the flag she is entitled to fly under the municipal laws of the country whose flag it is, but that such flag will not protect her if she has violated the rules against transfer to a neutral flag which are contained in Arts. 55 and 56.<sup>5</sup> It has been suggested that a vessel might be treated as an enemy vessel if owned wholly or in part by an enemy; but the suggestion<sup>6</sup> involves the absurdity that the vessel might thereby be an enemy vessel, if one sixty-fourth part of her were owned by an enemy subject, whereas she would be neutral if owned by a neutral company whose shareholders were largely enemy subjects. A ship owned by a British company but controlled from a place of business

<sup>1</sup> The meaning of this Article was considered by the Prize Court in *The Tommi*; *The Rothersand* (1914), 1 P.C. 16, at p. 22.

<sup>2</sup> Various questions as to what flag a vessel is entitled to fly were considered by the French Prize Court in a case decided during the Great War: *The Solveig* (1915), *Journal Officiel*, Nov. 12, 1915. It is generally admitted that a merchantman may make use of the flag of a foreign state in order to avoid capture; it is expressly recognised by Great Britain in the Merchant Shipping Act, 1894, s. 69. Cf. the discussion between the British and the American Governments in 1915 in regard to the assumption by the *Lusitania* of the flag of the United States: *Parl. Papers, Misc.* No. 6 (1915), p. 20. In *The Hamborn* (1917), 34 T.L.R. 145, a vessel under the Dutch flag, but German-owned, was condemned.

<sup>3</sup> This Article was abrogated by Great Britain during the Great War by the Order in Council of October 20, 1915, so that her Prize Courts were bound to apply the previously established rules. Cf. *The Proton* (1916), 2 P.C. 107.

<sup>4</sup> See *infra*, p. 323.

<sup>5</sup> See p. 269. Cf. *The Tommi*; *The Rothersand* (1914), 1 P.C. 16.

<sup>6</sup> See the Instructions to the British delegates at the Conference of London, par. (h).



Enemy  
character of  
goods.

Commercial  
domicile.

situated in enemy territory is liable to be treated as enemy property.<sup>1</sup> The law of France is to the same effect.<sup>2</sup>

In the case of merchandise more difficulty arises. The British courts had held that the determining factor was the domicile of the owner, domicile being established by proof of such circumstances as show an intention to make a place the place of residence for an indefinite period.<sup>3</sup> There were certain subsidiary rules applied: a commercial enemy domicile, for instance, was held to be established if the transactions in question originated in a house of trade established in an enemy country, but only in respect of those transactions,<sup>4</sup> and such commercial domicile could be terminated by a *bona fide* abandonment;<sup>5</sup> and where one of two partners had an enemy domicile, his share only of the partnership property was held to be enemy property.<sup>6</sup> A neutral might be held, too, to have an enemy domicile if the circumstances were such that his association in trade with the enemy was exceptionally close: if, for instance, he traded under a concession or monopoly granted by the enemy.<sup>7</sup> The property of an enemy subject domiciled in an enemy country and possessing a house of trade in a neutral country is considered to be enemy property; and if such property belongs to a partnership it is presumed, failing evidence to the contrary, to be divided proportionately between the partners, and the share of the partner with an enemy domicile is liable to condemnation.<sup>8</sup>

Goods consigned to a duly incorporated British company, to which the property has passed, are not liable to condemnation merely on the ground that the directors and shareholders

<sup>1</sup> *The St. Tudno* (1916), 2 P.C. 272. Cf. *The Polzeath* [1916] P. 241; 32 T.L.R. 647 (where the Court of Appeal declared forfeit to His Majesty a vessel under the Merchant Shipping Act, 1894, s. 1, and the Merchant Shipping Act, 1906, s. 51, on the ground that the company's principal place of business was in Hamburg, as she was controlled from there).

<sup>2</sup> Cf. *The Colonia* (1915), *Journal Officiel*, June 15, 1915; *The Bon Voyage* (1916), *ibid.* July 7, 1916.

<sup>3</sup> *The Harmony* (1800), 2 C. Rob. 322; *The Postilion* (1779), Hay and Marriott, 245. Cf. *The Hypatia* (1916), 2 P.C. 377 (goods of enemy partnership firm in neutral state; 'sufficient residence' of the partners or some of them in the country where the business is carried on, or where the house of trade is situated, is necessary to establish commercial domicile).

<sup>4</sup> *The Jonge Klassina* (1804), 5 C. Rob. 297, at p. 302; *The Portland* (1800), 3 C. Rob. 43.

<sup>5</sup> *The Indian Chief* (1801), 3 C. Rob. 12.

<sup>6</sup> *The Citto* (1800), 3 C. Rob. 38; *The Harmony* (1800), 2 C. Rob. 322. Cf. *The Manningtry* (1915), 1 P.C. 497.

<sup>7</sup> *The Freundschaft* (1819), 4 Wheaton, 105; *The Anna Catharina* (1802), 4 C. Rob. at p. 119.

<sup>8</sup> *The Clan Grant* (1915), 1 P.C. 272. Cf. *The Eumæus* (1915), 1 P.C. 605.

of the company are enemy subjects or domiciled in enemy territory.<sup>1</sup>

An enemy subject resident in an Eastern country in which his Government exercises extraterritorial jurisdiction does not acquire there a trade domicile for purposes of war, inasmuch as he remains subject to the jurisdiction of his own Government.<sup>2</sup>

An enemy subject who has acquired a trade domicile in a neutral country loses that domicile if, on the outbreak of war, he leaves the neutral country for another neutral country, in the absence of evidence that his departure is merely temporary.<sup>3</sup>

To this principle of domicile must be added the further rules of the British Courts, that the produce of land in the enemy territory is enemy property, though the owner of the land may be a neutral.<sup>4</sup>

Further, enemy goods on British ships, either on board at the outbreak of war or loaded during the hostilities, are seizable as prize on the high seas or in British ports and harbours.<sup>5</sup>

In relation to the above cases, a question sometimes arises as to the nationality of territory occupied by a belligerent during a war. The general rule which has been followed in the English cases is that mere military occupation does not change the character of a place; before this can happen it should, 'either by cession or conquest or some other means . . . either permanently or temporarily be incorporated with and form part of the dominions of the invader.'<sup>6</sup> But there are degrees in the nature of an occupation. In the case of *The Gerasimo*, Moldavia was a neutral country occupied by Russia, expressly and avowedly, for purely temporary purposes; while the American Court, when the island of Santa Cruz was captured by the British, treated it as having thereby

Produce of enemy territory.

Enemy goods on British ships.

Nationality of occupied territory.

<sup>1</sup> *The Poona* (1915), 1 P.C. 275.

<sup>2</sup> *The Derfflinger* (No. 1) (1915), 1 P.C. 386; *The Lützow*; *The Koerber* (1915), 1 P.C. 528; *The Eumæus* (1915), 1 P.C. 605. The question of acquiring a domicile in a non-Christian country has been considered in various earlier cases, e.g. *Re Tootal's Trusts* (1883), 23 Ch. D. 532, 534; *Abd-ul-Messih v. Farra* (1888), 13 App. Cas. 431, 441 (approving the latter); *Abdallah v. Rickards* (1888), 4 T.L.R. 622: the *animus manendi* is not sufficient, it must be supported by an identification with the civil society and manner of life of the country. The American Courts do not require the latter condition; cf. *Mather v. Cunningham* (1909), 74 Atlantic Reporter, 809.

<sup>3</sup> *The Flamenco*; *The Orduna* (1915), 1 P.C. 509.

<sup>4</sup> *The Phoenix* (1803), 5 C. Rob. 20; *The Vrouw Anna Catharina* (1806), 5 C. Rob. 161, at p. 167; *The Asturian* (1916), 2 P.C. 202, at pp. 205-206.

<sup>5</sup> *The Roumanian* (1914), 1 P.C. 75; affirmed by the Privy Council (1915), 1 P.C. 536.

<sup>6</sup> *The Gerasimo* (1857), 11 Moore, P.C. 88, at p. 96; Westlake, Part II, p. 168.

become British,<sup>1</sup> as an acquisition not necessarily permanent, but for all belligerent and commercial purposes part of the domain of the captor. In 1916 the Privy Council held that when territory is militarily occupied by a belligerent, the fact that it is under his control and that he can use it for the purposes of the war outweighs all considerations founded on the bare legal ownership of the soil; hence the British occupation of Egypt made Port Said an enemy port so far as Germany was concerned.<sup>2</sup>

The principle of domicile was also adopted by the United States, Spain, the Netherlands and Japan; but in accordance with their traditional policy, Germany, Austria, France,<sup>3</sup> Italy and Russia<sup>4</sup> insisted at the Conference of London on the principle of nationality, and no agreement could be reached.

Declaration  
of London as  
to goods on  
enemy  
vessel.

The rules laid down on the subject of the enemy or neutral character of goods suffer therefore from this important defect that, while the character of the goods is said to be determined by the character of the owner, no assistance is given in determining the character of the owner.

‘The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner’ (Art. 58).

‘In the absence of proof of the neutral character of goods found on board an enemy vessel, they are presumed to be enemy goods’ (Art. 59).

The latter Article amounts to no more than a statement of the previously existing rule.<sup>5</sup> The principle that would be adopted by the projected International Prize Court is therefore left in doubt; but, as the division of opinion on the Conference was so equal, it is not impossible that the principle of domicile will be accepted, though much will depend on the constitution of the court at any given time. If the principle of nationality is adopted, it is a matter of speculation whether or not it will involve the disappearance of the British rule that the produce of enemy soil is enemy though the owner of the soil be neutral; while the rules as to commercial domicile

<sup>1</sup> *The Thirty Hogsheads of Sugar (Bentzon v. Boyle)* (1815), 9 Cranch, pp. 191, 195; Westlake, Part II, p. 169; Hall, 7th ed. p. 541.

<sup>2</sup> *The Gutenfels* (1916), 2 P.C. 36, at p. 41.

<sup>3</sup> France, in 1870, in her instructions to naval commanders seemed to admit the principle of commercial domicile where goods were concerned; but her Courts did not modify their policy accordingly: Westlake, Part II, p. 163.

<sup>4</sup> Cf. *Parl. Papers, Misc. No. 5* (1909).

<sup>5</sup> Cf. *The Josephine* (1801), 4 C. Rob. 25; *The Frances* (1814), 8 Cranch, 354; *The Carlos F. Roses* (1899), 177 U.S. 655.



will certainly be abrogated, being in direct conflict with French decisions.<sup>1</sup>

The British Government, while advocating the principle of domicile, did not regard it as of vital importance, and in the course of the discussion were prepared to accept that of nationality, with the object of attaining to certainty on the question; but this concession did not enable the Conference to arrive at any unanimous decision.

By Art. 60 of the Declaration it was provided that:—

Transfer *in transitu*.

‘Enemy goods on board an enemy vessel retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are being forwarded.

‘If, however, prior to the capture, a former neutral owner exercises, on the bankruptcy of an existing enemy owner, a recognised legal right to recover the goods, they regain their neutral character.’

This is a provision essential to belligerents, owing to the ease with which all enemy goods on the sea at the time of the outbreak of war could be at once transferred to neutrals; and is necessary in the case of those systems of municipal law, such as the English,<sup>2</sup> according to which the mere contract may operate as a transfer of the property. The British Prize Courts would not recognise transfer *in transitu* either during or in contemplation of war;<sup>3</sup> for, but for this prohibition, ‘all goods shipped in the enemy’s country would be protected by transfers which it would be impossible to detect.’<sup>4</sup> It will be noted, however, that the right of stoppage *in transitu* in the case of the bankruptcy of the buyer is expressly safeguarded.<sup>5</sup>

<sup>1</sup> *Le Hardy v. La Voltigeante* (1799), Pistoye et Duverdy, *Traité des Prises Maritimes* (Paris, 1859), vol. i, p. 321; F. Snow, *Cases* (1893), p. 337.

<sup>2</sup> Cf. the Sale of Goods Act, 1893, sect. 17.

<sup>3</sup> *The Jan Frederick* (1804), 5 C. Rob. 133. Cf. *The Kronprinsessan Margareta* (1917), 2 P.C. 409. In *The Daksa* (1917), 2 P.C. 358, the Privy Council held that a transfer of goods at sea through the transferor’s fear of outbreak of war between his country and another cannot be set up as against the belligerent in fraud of whose rights it is deemed to have been made; but a transfer of goods at sea made by a German owner through fear of outbreak of war between his country and France is not void as against British captors after the outbreak of war between his country and the United Kingdom, such outbreak of war not having been apprehended at the time of the transfer.

<sup>4</sup> *The Vrow Margaretha* (1799), 1 C. Rob. at p. 338; Hall, 7th ed. p. 539; Westlake, Part II, p. 173. See also *The United States* (No. 1) (1916), 2 P.C. 390.

<sup>5</sup> This is in accordance with the old rule: cf. *The Constantia* (1807), 6 C. Rob. 324.

Neutral  
claims on  
captured  
vessels.

In the investigation of the ownership of captured property as vested at the commencement of the voyage, the Prize Court will disregard equitable liens on enemy property, and revelations of risk to neutral consignors.<sup>1</sup> In *The Marie Glaeser*, a vessel captured by the British at the beginning of the Great War, three classes of claimants (British and neutral) were concerned, viz. shareholders, mortgagees and persons claiming for brokerage and necessities. In the course of his judgment, the President observed that under the old practice the fate of a captured vessel depended on her flag; and a shareholder was bound thereby. Further, maritime liens are disregarded by the Court. Claims under mortgages are not sustainable;<sup>2</sup> they are no more valid against the rights of captors than are bottomry bonds or other maritime liens. Such is the practice adopted also by the Prize Courts of the United States,<sup>3</sup> France<sup>4</sup> and Japan.<sup>5</sup> Only the outward character of the vessel is to be considered both by the captor and by the Prize Court, and rights created by private agreement are not recognised.<sup>6</sup>

Similarly, enemy liens on neutral property are disregarded; they are not deemed to impress such an enemy character on ship or cargo as to make them confiscable.<sup>7</sup>

But where the shipment and the contract imposing the risk on a neutral consignor were both made in time of peace, *bona fide*, and not in contemplation of war, his original ownership continues till the end of the voyage, so that the cargo is not confiscable.<sup>8</sup>

Ransom  
bills.

A captured vessel may buy her freedom on the terms of a 'ransom bill,' which protects her from further capture; the due payment of the ransom being enforced by taking a hostage who must (according to the British practice), in

<sup>1</sup> *The Josephine* (1801), 4 C. Rob. 75; *The Tobago* (1804), 5 C. Rob. 218; *The Marianna* (1805), 6 C. Rob. 24.

<sup>2</sup> *The Aina* (1854), Spinks, 8.

<sup>3</sup> *The Hampton* (1866), 5 Wallace, 372; *The Carlos F. Roses* (1899), 177 U.S. 655.

<sup>4</sup> Cf. *Le Turner* (1870), Barboux, *Jurisprudence du conseil des prises*, 1870-1, p. 76.

<sup>5</sup> *The Nigretia* (1905), Takahashi, p. 552; 2 R. & J. Pr. Cas. 201; *The Russia* (1904), Takahashi, p. 557.

<sup>6</sup> *The Marie Glaeser* (1914), 31 T.L.R. 8; 1 P.C. 38.

<sup>7</sup> *The Ariel* (1857), 11 Moore, P.C. 119; *The Odessa* and *The Cape Corso* (1914), 1 P.C. 163. (*The Odessa*, affirmed by the Privy Council, 1915, 1 P.C. 554.) Similarly in the French Prize Court: *The Colonia* (1915), *Journal Officiel*, June 15, 1915.

<sup>8</sup> *The Atlas* (1801), 3 C. Rob. 299; *The Miramichi* (1914), 31 T.L.R. 72; 1 P.C. 137.

order to obtain his liberty, compel the owners to perform the terms of the bill. It is questionable whether the captor, being an enemy, has in the British Courts a direct right of action on the bill;<sup>1</sup> other countries, however, usually allow him to sue. In Great Britain the practice of ransoming may be forbidden by Order in Council.<sup>2</sup> In the United States there is no legislative act forbidding the transaction. In France it was permitted during the Franco-German War in case of imperative necessity.

<sup>1</sup> Cf. *Ricord v. Bettenham* (1765), 3 Burr. 1734; *The Hoop* (1799), 1 C. Rob. 201.

<sup>2</sup> Naval Prize Act, 1864, s. 45; see Westlake, Part II, pp. 181, 182; Hall, 7th ed. p. 489. By the Naval Prize Bill (sect. 40) (in the main a consolidating bill) laid before Parliament in 1910, and rejected, power to prohibit or allow ransoming by Order in Council was retained.



## CHAPTER VI

### POSTLIMINIUM; SALVAGE—CONCLUSION OF WAR

#### I. POSTLIMINIUM; SALVAGE

Origin of  
term.

IN Roman law the right of postliminium was the right which could be alleged by escaped prisoners entitling them to resume their legal status, as if they had never been away from home. 'Postliminium fingit eum qui captus est in civitate semper fuisse' (postliminium depends upon the fiction that a prisoner has never left his own state). It also applied to recaptured immovables and certain movables, *e.g.* trained horses, pack-mules, transport vessels. It did not apply to other booty; or to deserters, those who surrendered through cowardice or were formally surrendered to the enemy, and those who preferred to reside with the enemy.

Restoration  
of captured  
property.

From our point of view, the imposing title, and indeed the fiction itself, are hardly required in international law to express the fact that the rights of an owner are suspended, not destroyed, by occupation or capture, and revive when the suspending circumstance ceases to be operative.<sup>1</sup> The doctrine implied that the control of the invader or captor depended only on provisional possession and not on permanent appropriation. The return of captured territory and other property to the former owners might be effected in the following ways: <sup>2</sup> (1) Voluntary evacuation by the enemy and reoccupation by the ousted sovereign; (2) reconquest by the latter; (3) reconquest by a third state, followed by restoration to the ousted sovereign; (4) successful levy *en masse* (which is, however, closely related to No. (2) ); (5) in case of property, recapture by the former owner or abandonment by the captor; (6) restoration of the occupied or conquered territory and captured property by a treaty of peace. Thus, if a ship has been captured and is recaptured, postliminium, subject to the obligation to pay salvage, comes to the aid of the original owner. The Roman doctrine has bequeathed to the law of nations little

<sup>1</sup> Cf. Phillipson, *Termination of War and Treaties of Peace* (London, 1916), pp. 231, 232.

<sup>2</sup> Cf. Oppenheim, *Int. Law*, vol. ii, p. 339.

beyond the *damnosa hereditas* of a pretentious title; the re-entry into rights of ownership does not depend upon the fiction that they have never been interrupted, for it is conditioned upon a recognition of liabilities legally contracted by the other belligerent during the period of interruption. The modern doctrine has no application except during hostilities, for every treaty of peace, unless the contrary is explicitly stated, is tacitly based on the principle of *uti possidetis* (keeping what one has at the time), as opposed to the principle of *status quo ante bellum* (keeping what one had before the war broke out). Private property upon land not being a proper subject for capture, postliminium is generally limited in its effect to the national territory and to captured vessels.

A controversy which arose in 1871 illustrates the meaning of the doctrine.<sup>1</sup> During the Prussian occupation of France, the Prussian Government entered into contracts with certain persons for the sale of some public French forests. The price was paid by the purchasers in advance. When the Prussian occupation ceased, they claimed to be entitled to finish cutting down the trees for which they had already paid. This view was not accepted by the French authorities, and was negatived by an Article in the additional Convention of December, 1871. The French rights revived by postliminium the moment the Prussian occupation came to an end. France was bound by all executed contracts, and generally by the *status quo*, but, in view of the revival of her sovereignty, was not bound to acquiesce in acts which amounted to an executory derogation therefrom, and were, in addition, acts of 'waste,' which violated the now accepted principle (embodied in Art. 55 of the Hague Regulations) that an occupying state must act as the usufructuary only of the forests and other real property in occupied territory.<sup>2</sup>

When captured ships are recaptured by the owner's fellow-Salvage. countrymen or allies, they are not held by the recaptor as original prize, but revert to the prior owner, subject to his obligation to pay salvage. This subject is strictly municipal in its character, except in so far as the rights of allies and neutrals may be concerned, but a brief explanation of the principles and rules of salvage may be usefully added to this chapter. Bynkershoek quotes the old *Consolato del Mare*,

<sup>1</sup> For the case of the Elector of Hesse-Cassel, as bearing on this question, see *infra*, p. 288.

<sup>2</sup> See p. 250, *supra*.

the earliest of mediæval maritime codes, to the effect that restitution was only due, if the ship was recaptured before removal to a safe place (*infra præsidia*); if, on the other hand, it had been so removed, since the plenary ownership had passed to the enemy, recapture absolutely transferred both ship and cargo to the recaptor. According to the ancient laws of England,<sup>1</sup> Scotland<sup>2</sup> and France,<sup>3</sup> the same practice obtained, and the title of the original owner was obliterated. An English Ordinance of 1649, issuing from the Long Parliament, directed restitution of recaptured vessels to British subjects upon payment of salvage, without regard to intervening dealings other than adoption into the public service of the captors, a principle which was also adopted in naval prize acts in 1786 and 1864.<sup>4</sup> The *Consolato del Mare*, as we have mentioned, required that the recapture should take place before the vessel had been removed to 'a safe place,' a requisition sometimes known as the *infra præsidia* rule; other authorities adopted a time limit of twenty-four hours, in order to extinguish the owner's title, a test spoken of by Valin<sup>5</sup> as the common law of Europe.

A very interesting judgment of Lord Mansfield's in *Goss v. Withers*<sup>6</sup> suggests that neither of these tests was ever accepted in the English Prize Courts: 'I have taken the trouble to inform myself of the practice of the Court of Admiralty in England before any Act of Parliament commanded restitution, or fixed the rate of salvage; and I have talked with Sir George Lee, who has examined the books of the Court of Admiralty, and informs me that they held the property not changed, so as to bar the owner, in favour of a vendee or recaptor, till there had been a sentence of condemnation; and that, in the reign of King Charles II, Sir Richard Floyd gave a solemn judgment upon the point, and decreed restitution of a ship retaken by a privateer, after she had been fourteen weeks in the enemy's possession, because she had not been condemned.'

The judgment of Sir W. Scott in *The Flad Oyen*<sup>7</sup> was to the same effect, and, so far as British Prize Courts are con-

<sup>1</sup> See Crompton, *Court d'Admiraltie d'Angleterre*, p. 91.

<sup>2</sup> Lord Stair's *Decisions*, vol. ii, p. 507.

<sup>3</sup> Valin, *Comment. sur l'ord.*, liv. iii, tit. 9, art. 8.

<sup>4</sup> See Sir W. Scott's judgment in *The Ceylon* (1811), 1 Dodson, Adm. at pp. 117, 118; see also Westlake, Part II, pp. 179, 180. The Naval Prize Bill of 1910 (which was rejected) adopted the same principle (sect. 30).

<sup>5</sup> Valin, *Comment. sur l'ordonnance*, liv. iii, tit. 9, art. 8.

<sup>6</sup> (1759), 2 Burr. 694.

<sup>7</sup> (1799), 1 C. Rob. 135.



cerned, the rule may be clearly stated that no neutral may safely buy a British vessel in the enemy's hands until she has been formally condemned in a competent court. As between British subjects, not even condemnation can extinguish the title of the original owner in the event of recapture; his ownership revives by virtue of postliminium in every case except when his ship has been converted into a public vessel of the capturing power.

The amount of salvage payable varies in different countries. Amount of  
In England the ordinary rule is one-eighth of the ship's value; <sup>1</sup> salvage.  
in the United States one-eighth, if the recapture was due to a public ship, one-sixth, if to a privateer. French law directs restitution on payment of one-thirtieth of the value in case of recapture by a public vessel, if such recapture takes place within twenty-four hours of the original seizure; after that period the proportion payable rises to one-tenth. In Denmark the amount claimable from the original owner is one-third, in Sweden one-half, in Spain and Portugal one-eighth.

## 2. CONCLUSION OF WAR <sup>2</sup>

A war may be brought to an end in three ways:—

Modes of  
terminating  
war.

- (1) By the reciprocal intermission of hostilities, without any definite understanding being arrived at between the contending parties;
- (2) by the conquest and subjugation of one of the belligerents by the other, so that the former being reduced to impotence is compelled to submit to the will of the latter;
- (3) by a bilateral arrangement embodied in a treaty of peace, whether the honours of war be equal or unequal.

Of the first mode there are but few examples: in 1716, the war between Sweden and Poland; in 1720, the war between Spain and France; in 1801, that between Russia and Persia; in 1825, the Spanish colonial campaign; in 1867, the war between France and Mexico. Such procedure obviously involves serious difficulties, affecting both the belligerents and third states;

<sup>1</sup> See the Naval Prize Act, 1864 (sect. 40). Cf. *The Pontoporus* (1915), 1 P.C. 371 (a case in the Prize Court of the Straits Settlements); (1916), 2 P.C. 87 (one-sixth awarded). As much as one-fourth may be awarded if the recapture is made in circumstances of special difficulty or danger.

<sup>2</sup> On this part of the subject, see Phillipson, *Termination of War and Treaties of Peace* (London, 1916).

in the case of the former the relationships between the Governments and their subjects remain uncertain, in the case of the latter there is no definite time limit for the observance of the obligations of neutrality. Of the second mode of ending war, examples are more numerous; the arrangement effected between conqueror and conquered is not a treaty of peace proper; it represents usually the terms of surrender and absorption. It is, however, the almost invariable practice to restore a state of peace and determine its conditions by an armistice followed by a formal treaty of peace.

Treaty of  
peace.

The effect of a treaty of peace is entirely to extinguish the subject of dispute between the contracting parties. In practice a specific renunciation of the object in controversy is frequently required from the defeated party; but whether it be particularly inserted or not, the text-books lay down the academic proposition that recourse to arms is not again permissible for the same object. Thus Vattel says: 'The effect of the treaty of peace is to put an end to the war, and to abolish the subject of it. It leaves the contracting parties no right to commit any acts of hostility on account either of the subject itself which had given rise to the war, or of anything that was done during its continuance; wherefore they cannot lawfully take up arms again for the same subject. Accordingly, in such treaties the contracting parties reciprocally engage to preserve perpetual peace; which is not to be understood as if they promised never to make war on each other for any cause whatever. The peace in question relates to the war which it terminates, and it is in reality perpetual, inasmuch as it does not allow them to revive the same war by taking up arms again for the same subject which had originally given birth to it.'<sup>1</sup> Lord Stowell, too, observed: 'A treaty of peace is an agreement to waive all discussion concerning the respective rights of the parties, and to bury in oblivion all the original causes of the war.'<sup>2</sup> In many treaties a stipulation is found that the peace thus re-established shall be 'perpetual': e.g. in the First Peace of Paris, May 30, 1814; in the treaties of Paris, 1856; Zurich, 1859; Prague, 1866; Vienna, 1866; London, May 30, 1913. It is omitted, however, from most of the peace treaties of the last half-century.

A treaty of peace will naturally provide for the settlement of outstanding territorial disputes between the signatory parties,

<sup>1</sup> *Droit des gens*, liv. iv, chap. ii, § 19.

<sup>2</sup> *The Eliza Ann* (1813), 1 Dodson, 244, at p. 249.

but on all points where it is silent the principle of *uti possidetis* comes into play. Consistently with that principle, except in so far as the treaty itself contains other provisions, both parties keep what they hold when the instrument is drawn up.

The restoration of peace revives all private rights between the subjects of the belligerents in so far as they have been suspended but not entirely abrogated by the war;<sup>1</sup> further, it makes ransom bills and the contracts of prisoners of war immediately actionable.

The operation of a treaty of peace, especially with regard to the discontinuance in general of hostile relations, commences at the moment of signature, unless, of course, it is otherwise expressly agreed; and apart from such express stipulation, it cannot strictly be said to come into effect as a whole until the exchange of ratifications. Nice questions have sometimes arisen as to the responsibility of subjects for belligerent acts done after the treaty has been signed, but before they are affected with notice of its conclusion. For such intermediate acts it is now agreed that there is no criminal liability. On the question of civil liability Lord Stowell expressed the reasonable view in *The Mentor*:<sup>2</sup> ' . . . If an act of mischief was done by the king's officers, through ignorance, in a place where no act of hostility ought to have been exercised, it does not necessarily follow that mere ignorance of that fact would protect the officers from civil responsibility. . . . If the officer acted through ignorance, his own Government must protect him; for it is the duty of Governments, if they put a certain district within the king's peace, to take care that due notice shall be given to those persons by whose conduct that peace is to be maintained; and if no such notice has been given, nor due diligence used to give it, and a breach of the peace is committed through the ignorance of those persons, they are to be borne harmless at the expense of the Government whose duty it was to have given that notice.'

Date of  
operation.

Another interesting case on this question is *The John*.<sup>3</sup> Under the Treaty of Ghent, December 24, 1814, between Great Britain and the United States, the respective forces were to be ordered on the ratification (which was effected February 17, 1815) to cease all hostilities, and all 'vessels and effects' captured by either side after the dates specified were to be restored. The *John*, an American vessel, was captured after the expiration of the period, both captor and prize being ignorant of the

<sup>1</sup> See p. 182, *supra*.

<sup>2</sup> (1799), 1 C. Rob. 179, at p. 182.

<sup>3</sup> (1818), 2 Dodson, 336.



conclusion of peace. The prize, however, whilst in the possession of the captor, was soon afterwards lost through an act of God. The owners then sued for compensation. The alleged mismanagement of the ship by the captor not having been proved, Lord Stowell held that the only point to consider was the question of capture out of due time: the captor was not personally liable for the loss, inasmuch as he was ignorant of the conclusion of the treaty and he was in *bona fide* possession of the prize; but a liability might attach elsewhere (this being a point which the Court was not then asked to decide). Subsequently, the United States claimed compensation from Great Britain; and the claim was, together with others, referred in 1853 to a Joint Commission, which held, conformably to the decisions in the above cases, that a want of due diligence in notifying the cessation of hostilities gave an injured party a right to indemnity, and that, in order to prevent disputes as to what was due diligence, the practice was adopted of specifying certain periods for the cessation of hostile acts. In these circumstances the British Government was held responsible.<sup>1</sup>

Notice of  
peace.

Questions have arisen, too, as to the nature of the notice which imposes upon a commander the obligation to cease from hostilities, and it is reasonable that he should be affected only with notice from his own Government. On this principle the French Court in 1803 condemned as good prize the *Swine-herd* (designated *Le Porcher* in the French report)<sup>2</sup> captured by a vessel which had received no official notification of the conclusion of peace (viz. the Peace of Amiens, March 27, 1802). It is true that in this case the time fixed by the treaty of peace for the suspension of hostilities in the area affected had not expired; but the case was undoubtedly an instance of hardship caused by the strict application of the rule. However this may be, in the case of *The Nymph*, heard by the same Court a few days later, it was held that the capture was invalid, because it was proved that, though it had been effected before the expiration of the specified period, the captor had sufficient knowledge of the establishment of peace, which had been communicated to him by the British authorities. The French advocate-general observed that the receipt of news of the peace from the enemy, implying that he has ceased offensive operations, demands a cessation of hostilities on the part of the other side; to take advantage of the safety, consequent on

<sup>1</sup> J. B. Moore, *International Arbitrations* (Washington, 1898), vol. iv, p. 3793.

<sup>2</sup> Pistoye et Duverdy, *Traité des prises maritimes*, vol. i, p. 152.

such communication, and continue the offensive is an act of perfidy and disloyalty and a stain on the French name.<sup>1</sup>

Where no date is fixed for the discontinuance of hostilities, all captures effected after the conclusion of peace must be restored as soon as that fact becomes known.<sup>2</sup> Capture after peace.

A prize that has been captured during the war, and recaptured after the establishment of peace and in ignorance thereof, should be restored to the captor; for neither the proprietary rights of the captor (that is, where the vessel had been duly condemned) nor his possessory rights (where the vessel had not yet been condemned) may be forcibly interfered with after peace is restored and notified.<sup>3</sup>

Whether a Prize Court may, after the conclusion of peace, adjudicate on vessels that were captured during the war, is, in the absence of an express provision to the contrary,<sup>4</sup> rather uncertain. There are cases in which an affirmative answer has been given.<sup>5</sup> Thus the *Ceres*, a vessel under Dutch flag bound for England, was captured by the French before the establishment of peace, and was brought before the Prize Court on May 16, 1814, when peace had already been concluded. The Conseil d'État supported the condemnation, on the ground that it is for the Court to consider only the rules and circumstances existing at the time of the capture and not those existing at the time of adjudication. It would seem, however, that a contrary conclusion is, on principle, justifiable, inasmuch as the adjudication by a Prize Court partakes of the character of a hostile act, as it is the essential complement of the capture. In 1896 the question was raised again in the case of the war between Italy and Abyssinia. The *Doelwijk*, a Dutch vessel (*i.e.* neutral), having been seized by an Italian cruiser for carrying contraband, the Italian Prize Court held, December 8, 1896, that it was competent to investigate the legitimacy of the capture; but it refrained from decreeing condemnation, on the ground that peace had in the meantime been declared, and that a sentence of condemnation would be an act contrary to the resumption of pacific relations, as it would thereby

<sup>1</sup> Pistoye et Duverdy, vol. i, p. 155.

<sup>2</sup> Cf. *Bain v. Speedwell* (1784), 2 Dallas, 40.

<sup>3</sup> Cf. *The Schoone Sophie* (1805), 6 C. Rob. 138.

<sup>4</sup> For examples of such express provisions, see the treaties of Zurich, 1859, Vienna, 1864, and Frankfort, 1871, whereby captured vessels that were not yet condemned at the restoration of peace were to be returned to the owners.

<sup>5</sup> Pistoye et Duverdy, vol. i, p. 145.

impose on another's property a limitation no longer justified by the necessity of legitimate defence.<sup>1</sup>

This view of the Italian Court was not adopted, however, by the Japanese Prize Courts in 1905, which held that captures—either from the enemy or from a neutral—made during the war may be adjudicated upon, and a decree of condemnation may be pronounced.<sup>2</sup>

Indemnity  
clause.

In every treaty of peace is implied, or expressly set forth, an indemnity clause extinguishing all claims for damage done in war, or springing from warlike operations. 'I will not take upon myself to say,' said Lord Stowell,<sup>3</sup> 'that a treaty of peace puts an end to all questions of property between the subjects of the states entering into the treaty; perhaps it may be more strictly correct to say that it quiets all titles of possession arising out of the war only. At the same time, when a treaty of peace has been concluded, the revival of any grievances arising before the war comes with a very ill grace, and is by no means to be encouraged.'

Various  
articles of a  
peace treaty.

The clauses of a peace treaty may be conveniently divided into three classes:—

- (1) General—those relating directly to the cessation of hostilities and the establishment of peace, and regulating matters which the war itself has brought into existence;
- (2) special—those relating to the essential points at issue, for which the war was begun, so that they embody what may be described as the price of peace;
- (3) miscellaneous—those relating to matters that are peculiar to this or that treaty, though in many cases they may logically be classified under (1) or (2).

The general clauses, which are found in every treaty of peace and are frequently drawn up in like terms, comprise the following subjects: the cessation of hostilities and the resumption of peace, together with the date of operation; the evacuation of territory under military occupation; the restoration of property captured or regulation conformably to the principle

<sup>1</sup> Cf. the judgment, in a French translation, given in *Archives diplomatiques* (Paris), Jan. 1897, pp. 81 *seq.*; *Journ. du droit int. privé* (Paris), vol. xxiv, pp. 850 *seq.*

<sup>2</sup> Cf. *The Australia* (1906), 2 R. & J.P. Cas. 373; *The Montara* (1906), 2 R. & J.P. Cas. 403.

<sup>3</sup> In *The Molly* (1814), 1 Dodson, 395.



of *uti possidetis*; the restoration of prisoners of war; the granting of an amnesty to those who were compromised during the war through certain acts; the revival or abrogation of treaties existing before the war. The special articles that are found in nearly all treaties relate on the one hand to the payment of a war indemnity, and on the other to the cession of territory. Amongst the miscellaneous articles may be mentioned the following: those relating to demobilisation, destruction of fortresses, the tombs of the fallen; the regulation of communications, waters, navigation, fishery, customs, treatment of shipping, the rights of subjects of one party expelled during the war by the other party from the latter's territory, compensation to subjects for losses caused by military operations or during military occupation, the establishment of new states, etc. Besides the main instrument, there are further instruments, some of which are signed on the same day as the main instrument, and others are drawn up and signed subsequently, which embody 'additional' or 'separate' articles and secret articles. The former are generally supplementary to the principal treaty, providing for the various details regarding the due performance of the clauses of the main instrument. Secret articles are such additional articles as are intended to be kept secret as between the contracting parties, in the interests of public policy or state exigencies.

Where territory is ceded, many important questions arise as to state succession.<sup>1</sup> In this respect the guiding principles governing the position of the ceding state and the cessionary state may be expressed, conveniently if not quite strictly, by the civil law maxims: '*res transit cum suo onere*,' and '*nemo plus juris ad alium transferre potest quam ipse habet*.' The rights and obligations of the cessionary state with regard to the territory it acquires relate to a great variety of questions, *e.g.* the nationality and allegiance of the ceding state's subjects and other inhabitants belonging to the ceded territory; existing treaties appertaining to this territory; its public law and administration; property; debts; concessions; private law and private rights, etc. International law and practice furnish no definite rules for the determination of these and similar problems; so that a solution must be expressly arrived at by agreement between the parties concerned. One point, however, is pretty well established, *viz.* that a new nationality and allegiance should not be imposed on the inhabitants of ceded territory against their will, and that they should be allowed to

Cession of  
territory and  
state  
succession.

<sup>1</sup> See Phillpson, *Termination of War and Treaties of Peace*, pp. 270 *seq.*

exercise their option. It is beyond the scope of this book to go fully into this question, and the other matters relating to State Succession. Certain points, however, which apply to cession proper will be referred to presently in reference to the annexation of territory incidental to conquest.

Conquest.

Conquest is the permanent absorption of all or part of the territory of a defeated enemy. A title resting upon conquest is not complete until the conqueror has satisfied two requirements. In the first place, he must possess the material strength to make his conquest good, and in the second, he must have, and exhibit, the intention of appropriation. The rights of an occupier naturally fall far short of those conceded to conquest, and it is sometimes difficult to determine when the one has definitively passed into the other.

Case of  
Hesse Cassel.

The leading case on this point is known as the case of Hesse Cassel.<sup>1</sup> In 1806 the Elector of Hesse Cassel was driven from his electorate by Napoleon, and remained excluded for eight years. For a year after his expulsion Napoleon governed Hesse Cassel under military law, and then incorporated it in the kingdom of Westphalia. Jerome Bonaparte was placed on the throne of this newly created kingdom, and his succession was recognised by the treaties of Tilsit (1807) and Schönbrunn (1809). Prior to his expulsion the Elector had lent money on mortgage to one Count von Hahn; the latter had received a discharge in full from Napoleon on payment of part of the money advanced. On his return the Elector instituted proceedings against the estate of his debtor, who had died in the meantime, thus raising the whole question of the validity of Napoleon's acts. If Napoleon had effected a definitive conquest of Hesse Cassel, the acts sought to be set aside were well within his legal rights. The Elector had joined the Prussian forces, and was therefore in arms against the lawfully constituted authorities of his country. This circumstance justified confiscation of his private property within the dominion, while the conqueror succeeded to all public property by a species of universal succession. The question was therefore one of fact, and was carried from the Mecklenburg court to the Universities of Kiel and Breslau, and thence by way of appeal to a further University. This ultimate tribunal declined to recognise the Elector's claim on the grounds that Napoleon's conquest had been definitive, that the Elector had been treated

<sup>1</sup> Phillimore, *Commentaries*, vol. iii, §§ 568-574, pp. 841 seq.; Cobbett, *Cases*, vol. ii (1913), pp. 248 seq.

by the treaties of Tilsit and Schönbrunn as 'politically extinct,' and that his restoration was not a continuation of his former rule, but a government beginning *de novo*, and inheriting only what was left by its legal predecessor.

When a state absorbs by conquest a part or the whole of another state, its position with regard to the liabilities of the conquered state is a matter of some difficulty. From the opinions expressed by writers on international law, it is possible to draw up a few general rules, which no doubt afford some guidance as to what in equity ought to be done; but international practice on the subject hardly provides anything which can be called a rule of law.

Effects of  
conquest  
upon lia-  
bilities.

It may be laid down roughly, in the first place, that the conqueror succeeds to all the assets of a ceded or conquered territory. From the maxims 'res transit cum suo onere' and 'nemo plus juris transferre potest quam ipse habet,' it would naturally follow that such assets must be taken subject to the liabilities attached to them; and we consequently find it stated that a ceded province is taken by the conqueror subject to the debts charged upon it or upon its resources.<sup>1</sup> It is also suggested that in such case the conqueror ought to take over a proportionate part of the general liabilities of the conquered state; and there are a few instances in which such liability has been taken over, but only by virtue of special conventions which negative the existence of any obligation apart from convention.<sup>2</sup> As, when a conquered state is wholly absorbed, all its liabilities must be said to be charged upon its resources, it would follow, logically, that the conqueror takes the territory subject to such liabilities; and this is the view of Hall<sup>3</sup> and Westlake,<sup>4</sup> the latter suggesting that the liability must be limited to the value of the assets received, if and in so far as such limitation is practicable; but he is of opinion that 'there seems no reason why the general debt of an extinguished state should fare better, in point of the future security for it, than the local debt of a transferred province.'<sup>5</sup> To these authorities may be added the dictum

<sup>1</sup> Cf. Hall, 7th ed. pp. 93, 100; Westlake, Part I, pp. 68 *seq.*; Oppenheim, *International Law*, vol. i, pp. 129, 288; Phillimore, vol. i (2nd ed.), p. 336; Rivier, *Principes du droit des gens*, vol. i, p. 70; and cf. an article in the *Law Quarterly Review*, vol. xvii, p. 392, by Professor Westlake. See also Phillipson, *Termination of War and Treaties of Peace*, pp. 41 *seq.*, and the additional references there cited.

<sup>2</sup> Hall, p. 100n.

<sup>3</sup> 7th ed. p. 101.

<sup>4</sup> Part I, p. 77.

<sup>5</sup> *Ibid.*



of James, V.C., in *U.S.A. v. McRae*:<sup>1</sup> 'I apprehend it to be the clear, public, universal law that any Government which *de facto* succeeds to any other Government—whether by revolution or restoration, conquest or reconquest—succeeds to all the public property . . . and to all rights in respect of the public property of the displaced power. . . . But this right . . . can only be enforced in the same way and to the same extent, and subject to the same correlative obligations and rights, as if that authority had not been suppressed and displaced, and was itself seeking to enforce it.'

War debts.

But it is generally admitted, by way of exception to the general rule, that the conqueror cannot be held liable for debts incurred by the conquered state for the purpose of carrying on the war, for no state can be assumed to undertake responsibility for acts directed against itself; nor is the reasonableness of the rule itself entirely free from doubt, for, as was pointed out by the Lord Chief Justice in *West Rand Central Gold Mining Company v. The King*:<sup>2</sup> 'A country has issued obligations to such an amount as wholly to destroy the national credit, and the war, which ends in annexation of the country by another power, may have been brought about by the very state of insolvency to which the country has been reduced by its own misconduct. Can any valid reason be suggested why the country which has made war and succeeded should take upon itself the liability to pay out of its own resources the debts of the insolvent state?'

General debt.

In the history of international relations there is little to be found which affords any guidance on the question. By agreement, as we have mentioned, a part of the general debt of the conquered state has sometimes been taken over; and the United States has, in the course of negotiations, more than once insisted that the conqueror takes the place of the conquered and is subject to his liabilities.<sup>3</sup> Her conduct was perhaps consistent with this attitude when, on absorbing Texas (1845), she specifically disclaimed any general liability, thereby, it may be, admitting liability in default of a specific disclaimer;<sup>4</sup> and when, in 1898, she gave as a reason for refusing to undertake the debts of Cuba the fact that they were not created by Cuba itself or incurred for its benefit, but were created by Spain for her own purposes and mainly for maintaining a Spanish army on the island.<sup>5</sup> The

<sup>1</sup> (1869), L.R. 8 Eq. 69, at p. 75.

<sup>3</sup> Cf. Westlake, Part I, pp. 62, 63, 75.

<sup>5</sup> Moore, *Digest*, vol. i, pp. 356 seq.

<sup>2</sup> (1905), 2 K.B. 391, at p. 403.

<sup>4</sup> *Ibid.* p. 77.

Italian Courts in 1877 laid it down that, in the case of the cession of a part of a state's territory, the transferee is liable to debts contracted in relation to the ceded territory;<sup>1</sup> and there is authority to be found in English cases for the same proposition.<sup>2</sup> But whether the doctrine can be described as a rule of international law or not, it will clearly not be held to be a rule of such clearness and general acceptance as to be entitled to recognition in an English municipal court at the present day. Halleck points out that there may be rights recognised in international law which nevertheless require legislation to bring them under the protection of the municipal law: 'a refusal to pass the necessary remedial acts . . . would be a violation of the obligations imposed . . . by the law of nations,'<sup>3</sup> but the remedy can only be enforced by diplomacy. This is the explanation of the cases of *Cook v. Sprigg*<sup>4</sup> and *The West Rand Central Gold Mining Company v. The King*.<sup>5</sup> In the former case the distinction is clearly drawn: 'According to the well-known rules of international law, a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation.' In the latter case this 'well-known rule' had, in the judgment of the court, become no rule at all; for not only did the court decide that a municipal court has not authority to enforce such a rule, unless directed by legislation so to do, but that there was no principle of international law rendering the conqueror liable to the debts of the conquered incurred before the war. Guided in the main by the former of these two cases, the Commissioners who, in 1900 and 1901, inquired into the concessions granted by the Transvaal Government before the Boer War, declared that 'it is clear that a state which has annexed another is not legally bound by any contracts made by the state which has ceased to exist, and that no court of law has jurisdiction to enforce such contracts if the annexing state refuses to recognise them,'<sup>6</sup> a dictum which, while undeniably correct in its statement of the position of an English court, can hardly be said to be of much authority when the question arises, in an international dispute, whether the annexing state was right or wrong in its refusal.

The complete conquest of a country has the effect legally of converting the inhabitants of the conquered country into

Effects of  
conquest  
upon  
persons.

<sup>1</sup> Westlake, Part I, p. 80.

<sup>2</sup> e.g. *United States of America v. McRae* (1869), L.R. 8 Eq. 69, at p. 75.

<sup>3</sup> Halleck, 4th ed. vol. ii, p. 530,

<sup>4</sup> (1899), A.C. 572, 578.

<sup>5</sup> (1905), 2 K.B. 391,

<sup>6</sup> *Parl. Papers*, 1901, Cd. 623, p. 7.

citizens of the conqueror's state, unless, perhaps, they leave the conquered territory or, being out of it, remain out of it except for a temporary purpose.<sup>1</sup> Where a country cedes a portion of its territory to a conqueror, the position is somewhat different, for in that case the cession is an act of the ceding state, by which its subjects are presumptively bound; <sup>2</sup> but it is usual to stipulate that the inhabitants of the portion ceded shall be at liberty to retain their nationality of origin on condition that they leave the territory ceded. But it is not settled beyond question, either in the case of conquest or of cession, that the subject has the right, by leaving the country, of retaining his old nationality; and in the American case of *United States v. Repentigny*,<sup>3</sup> it was laid down by Mr. Justice Nelson on behalf of the Supreme Court:—

(1) That on a conquest by one nation of another, and the subsequent surrender of the soil and change of sovereignty, those of the former inhabitants who do not remain and become citizens of the victorious sovereign, deprive themselves of protection and security to their property, except so far as it may be secured by treaty.

(2) When on such a conquest it was provided by treaty that the former inhabitants, who wished to adhere in allegiance to their vanquished sovereign, might sell their property, provided they sold it to a certain class of persons and within a time named, the property, if not so sold, became abandoned to the conqueror.

<sup>1</sup> Westlake, Part I, p. 70. See also Phillipson, *Termination of War*, etc., pp. 36 *seq.*

<sup>2</sup> Hall, 7th ed. p. 612.

<sup>3</sup> (1866), 5 Wallace, 211, at p. 260.



# PART IV

## THE RIGHTS AND DUTIES OF NEUTRAL POWERS

### CHAPTER I

#### GENERAL PRINCIPLES OF NEUTRALITY AS BETWEEN STATES

THE law of neutrality differs from other branches of international law in the comparative certainty with which its rules may be stated. Neutrality is the condition of states which stand aloof from a war between other states; they may continue such pacific intercourse with the belligerents as will not consist in giving direct aid to either side in the prosecution of its hostilities. Thus the essential significance of neutrality lies in the negative attitude of holding aloof, and not in the positive attitude of offering impartial treatment to the adversaries. The outbreak of every war affords occasion for the exercise of neutral duties and the concession of neutral rights; belligerents are, as a rule, unwilling to add to their complications by the commission of acts which as between themselves and neutrals are of doubtful legality, and the decisions of their prize courts have, on the whole, been successful in evolving a body of harmonious and intelligible doctrine.

Meaning of  
neutrality.

The Hague Conference of 1899 drew up four Articles on two points relating to the position of neutrals, the internment of belligerents and the care of the wounded in neutral countries:<sup>1</sup> and expressed a 'wish'<sup>2</sup> that the question of the rights and duties of neutrals should be inserted in the programme of a future Conference. In 1907 the subject was considered at greater length, and two Conventions<sup>3</sup> were, with certain reservations, agreed upon, limited in their scope and confined for the most part to the statement of hitherto accepted principles. Convention V dealt with warfare on land, and Convention XIII with warfare at sea.<sup>4</sup>

The Hague  
Conventions

<sup>1</sup> Arts. 57-60 of the Annex to Convention II of 1899.

<sup>2</sup> *Vœu* 2 of 1899.

<sup>3</sup> Conventions V and XIII of 1907.

<sup>4</sup> Neither of these Conventions has been ratified by Great Britain. Several other belligerents in the Great War have not ratified them, *e.g.* Italy, Serbia and Montenegro on the one side, and Turkey and Bulgaria on the other.

The development of opinion has tended to impose stricter obligations upon neutral powers than were at one time required. It has long been admitted that a neutral is obliged to exhibit impartiality between belligerents, and that the latter are correlatively bound to abstain, in deference to the sovereignty of the neutral, from making any military use of his territory or his territorial waters. In the words of Convention V of 1907 above referred to, 'the territory of neutral powers is inviolable,'<sup>1</sup> and—as a positive prohibition—'belligerents are forbidden to move across the territory of a neutral power troops or convoys, either of munitions of war or supplies';<sup>2</sup> and neutrals are bound to see that this rule is obeyed.<sup>3</sup> The corresponding provisions of Convention XIII<sup>4</sup> in relation to naval war are that 'belligerents are bound to respect the sovereign rights of neutral powers, and to abstain in neutral territory or neutral waters from any act which would, if knowingly permitted by any power, constitute a violation of neutrality.'<sup>5</sup> Any act of hostility, including therein capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral power, constitutes a violation of neutrality and is strictly forbidden.<sup>6</sup> And the setting up of a prize court in neutral territory, or on a vessel in neutral waters, is a violation of neutrality.<sup>7</sup>

Earlier usage, however, was content with a standard of impartiality which fell far short of later requirements. It was common for neutrals to supply troops to one of two belligerents, under a previous treaty, nor was the practice held to involve any deviation from neutrality, which was therefore regarded, in such circumstances, as imperfect, qualified or conventional neutrality, as distinguished from natural or perfect neutrality. A treaty of 1781 bound Denmark to

<sup>1</sup> Art. 1.

<sup>2</sup> Art. 2.

<sup>3</sup> Art. 5.

<sup>4</sup> In *The Bangor* (1916), 2 P.C. 206, it was held that this Convention was not intended to deal with any question as between belligerents, and did not affect the rule of international law as to capture in neutral waters, as between belligerents, where the neutral state did not intervene; hence on capture of a vessel flying the neutral flag for carrying supplies to the enemy warships, even if the capture be effected in neutral waters, neither an enemy nor a neutral acting the part of an enemy may demand the restoration of captured property on the ground of capture in neutral waters.

<sup>5</sup> Art. 1 of Convention XIII.

<sup>6</sup> Art. 2. In March, 1915, a British squadron brought about the destruction of the German cruiser *Dresden* in Chilean territorial waters, on the assumption that she was abusing Chilean neutrality and that the local authorities were powerless to effect her internment: *Parl. Papers, Misc.* No. 9 (1915).

<sup>7</sup> Art. 4.

Supply of  
troops and  
ships—  
former  
usage.

supply certain troops to Russia in the event of war.<sup>1</sup> In 1788 war broke out between Russia and Sweden. In pursuance of the provisions of the treaty, Denmark furnished the contingent promised, and defended her conduct in so doing by a declaration sent to Sweden. It ran as follows: 'His Danish Majesty has ordered the undersigned to declare that, although he complies with the treaty between the courts of Petersburg and Copenhagen in furnishing the former with the number of ships and troops stipulated by several treaties, and particularly that of 1781, he yet considers himself in perfect amity and peace with his Swedish Majesty; which friendship shall not be interrupted, although the Swedish arms should prove victorious, either in repulsing, defeating or taking prisoners the Danish troops now in the Swedish territories, acting as Russian auxiliaries, under Russian flags. Nor does he conceive that his Swedish Majesty has the least ground to complain, so long as the Danish ships and troops now acting against Sweden do not exceed the number stipulated by treaty; and it is his earnest desire that all friendly and commercial intercourse between the two nations, and the good understanding between the courts of Stockholm and Copenhagen, remain inviolably as heretofore.' The Swedish representative agreed to the proposal on grounds which were carefully stated to be merely politic, and added that the Danish contention 'is a doctrine which his Swedish Majesty cannot altogether reconcile with the law of nations and rights of sovereigns, and against which his Majesty has ordered [Baron de Sprengtporten] to protest.'<sup>2</sup> The objection of Sweden was not to the lending of aid to Russia (that this was permissible owing to the treaty, so long as the Danish forces remained in Russian territory, was admitted), but to the invasion of Sweden by the Danish troops; and this objection, with the like reservation, was in effect supported by Great Britain and Prussia.

The justification of similar action by reference to a prior treaty was admitted by Great Britain in 1803 and 1804, and that nation acted on the same principle in 1826.<sup>3</sup> This is believed to supply the last occasion on which such assistance has been given by a neutral, and the practice may now be confidently pronounced extinct. The rendering of military aid by A to B, while the latter is at war with C, is essentially an unneutral act, and it is no answer to C's complaint that A

<sup>1</sup> See Cobbett, *Cases*, vol. ii, p. 302.

<sup>2</sup> *Annual Register* (1788), vol. xxx, pp. 292, 293.

<sup>3</sup> Westlake, Part II, p. 207.



was under contract to commit the act of illegality. Such an injury to C constitutes a *casus belli*, and the fact that it may be impolitic so to treat it is without bearing upon the legal question.

The Hague  
rule.

At the Hague in 1907 no specific prohibition of the supply of troops in land warfare was enacted; but in relation to naval warfare it was agreed that 'the supply, in any manner, directly or indirectly, of warships, supplies, or war material of any kind whatever, by a neutral power to a belligerent power, is forbidden';<sup>1</sup> though 'a neutral power is not bound to prevent the export or transit, for either belligerent, of arms, munitions of war, or, in general, of anything which could be of use to an army or fleet.'<sup>2</sup>

Neutral  
money loans.

It would be clearly a violation of neutrality for a neutral state to make a money loan to a belligerent, but the question is more open to doubt in cases where the loan issues from neutral individuals. Money is an ordinary commodity of trade, and, as will be seen later, the neutral right to trade remains, on principle, unaffected by war. According to the better view, if the transaction is merely a commercial one, providing for the *bona fide* payment of reasonable interest, it involves no derogation from neutrality calling for government interference. To this effect were the opinions of the English law officers given in reply to Mr. Canning in 1823, in connection with the Greek War of Independence: 'With respect to loans, if entered into merely with commercial views, we think, according to the opinions of writers on the law of nations, and the practice that has prevailed, that they would not be an infringement of neutrality.' It has been decided in England<sup>3</sup> and in America<sup>4</sup> that it is illegal for individuals to raise money by way of loan to assist subjects of a foreign state, so as to enable them to prosecute a war against their own Government, while the latter is in amity with that of the lenders. Thus, in 1873, Mr. Gladstone pointed out in the House of Commons strong objections to the raising of a gratuitous loan in England for the Spanish Pretender, Don Carlos.<sup>5</sup> In cases where the belligerent persons are independent powers, the right of neutral individuals to make *bona fide* loans is well recognised in practice. Thus, in the Crimean War, Russia

<sup>1</sup> Art. 6 of Convention XIII.

<sup>2</sup> Art. 7.

<sup>3</sup> *De Wütz v. Hendricks* (1824), 9 Moore, C.P. 586.

<sup>4</sup> *Kennel v. Chambers* (1852), 14 Howard, 38.

<sup>5</sup> *The Times*, April 25, 1873.

obtained money in Germany and Holland; in the Franco-German War, French and German loans were issued in London; in the Russo-Japanese War, 1904, Japan raised funds in England and Germany, and Russia in France and Germany.

Though neutral states are not bound to prevent their subjects from lending money to belligerents in the ordinary way of business, they have sometimes, in circumstances of grave difficulty, deemed it proper to impose restrictions, for the purpose of maintaining strictly the obligations of neutrality. Thus, soon after the commencement of the Great War, 1914, the Government of the United States declared that the advancing of 'loans by American bankers to any foreign nation which is at war was inconsistent with the true spirit of neutrality.' This declaration was emphatically deprecated in America: it was agreed that a national loan would be illegitimate, but it was contended that loans by private citizens did not constitute an infringement of neutrality. The Secretary of State, however, observed: '... A war loan, if offered for popular subscription in the United States, would be taken up chiefly by those who are in sympathy with the belligerent seeking the loan. The result would be that great numbers of the American people might become more earnest partisans, having a material interest in the success of the belligerent whose bonds they hold'; and he added that, as the prohibition to enter into such transactions affected all the belligerents equally, it was in accordance with the fundamental principles of neutrality.<sup>1</sup> A neutral Government is, of course, empowered to impose such a prohibition; but if it does so it acts purely on grounds of policy, and not on grounds of international law and usage, which, as we have seen, do not forbid financial transactions on a business footing between belligerent Governments and the private individuals of neutral states. However this may be, not long afterwards the prohibition was withdrawn, and a great loan was raised in the United States on behalf of Great Britain.

At the Hague in 1907 it was laid down that a neutral individual (who is defined as the national of a state who is not taking part in the war<sup>2</sup>) cannot claim the benefit of his neutrality if he commits hostile acts against a belligerent, or acts in favour of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties;

<sup>1</sup> Communication made by Mr. Bryan, the United States Secretary of State, to the Chairman of the Senate Committee on Foreign Relations, published by the State Department, January 24, 1915 (*The Times*, Jan. 26, 1915, p. 10).

<sup>2</sup> Art. 16 of Convention V of 1907.

but that in such a case he is not to be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent state could be for the same act.<sup>1</sup> But he does not commit an act in favour of one of the belligerents by furnishing supplies or making loans to one of them, provided that he does not live in the territory belonging to or in the occupation of the other party, and that the supplies do not come from such territory; or by rendering services in matters of police or civil administration.<sup>2</sup> These provisions were not accepted by Great Britain, France, Russia or Japan. They had originally formed part of a wider proposal made by Germany, which would have placed neutrals resident in a belligerent country in a far better position as regards freedom from services and contributions to the war than the nationals of the country; and this the states mentioned were not prepared to allow. But in principle there seems to be no objection to the rules laid down as to the furnishing of supplies and loans.<sup>3</sup>

Foreign enlistment.

Volunteering on the part of neutral individuals for the service of belligerents has long been forbidden by municipal laws. In this country it was provided, as long ago as the reign of George II, that if any subject of Great Britain shall enlist himself in any foreign service without licence under the king's sign-manual, he shall be guilty of felony without benefit of clergy.<sup>4</sup> Such acts are, moreover, generally forbidden in terms by proclamations of neutrality issued on the outbreak of war. At the same time, it is held that isolated cases of disobedience are not imputable to a Government which has observed proper precautions. There is reason to believe that the number of foreigners who served with the Boer forces in the recent war was considerable, but there was no disposition to see in that circumstance a derogation from the neutrality of the states to which they respectively belonged.

Use of neutral territory.

Under the same head as the last falls the prohibition imposed upon neutrals against allowing their territory to be used by a belligerent in a mode derogatory to the neutral sovereignty. Canning, in a speech delivered in 1823, referred to a memorable American precedent: 'If I wished,' said he, 'for a guide in

<sup>1</sup> Art. 17.

<sup>2</sup> Art. 18.

<sup>3</sup> See *Parl. Papers, Misc. No. 4* (1908), pp. 134-145; Westlake, Part II, p. 252; Pearce Higgins, *The Hague Conferences*, p. 293.

<sup>4</sup> 9 Geo. II, c. 30, 29 Geo. II, c. 17; and cf. the Foreign Enlistment Act, 1870 sects. 4 and 7.



a system of neutrality, I should take that laid down by America in the days of the presidency of Washington and the secretaryship of Jefferson. In 1793, complaints were made to the American Government that French ships were allowed to fit out and arm in American ports for the purpose of attacking British vessels, in direct opposition to the laws of neutrality. Immediately upon this representation the American Government held that such a fitting out was contrary to the laws of neutrality, and orders were issued prohibiting the arming of any French vessels in American ports. At New York a French vessel fitting out was seized, delivered over to the tribunals and condemned. Upon that occasion the American Government held that such fitting out of French ships in American ports for the purpose of cruising against English vessels was incompatible with the sovereignty of the United States, and tended to interrupt the peace and good understanding which subsisted between that country and Great Britain.' <sup>1</sup>

Jefferson's opinion was elicited by the extraordinary views of belligerent right held by M. Genêt, then French Minister in the United States. Besides the acts referred to in the above passage, complaint was made that he issued commissions to American citizens to fit out privateers and prey upon British commerce. Jefferson, in a note to the American ambassador in Paris, indicated the element of illegality with great propriety: 'The right of raising troops being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign power or person can levy men within its territory without its consent. . . . If the United States have a right to refuse the permission to arm vessels and raise men within their ports and territories, they are bound by the laws of neutrality to exercise that right and to prohibit such armaments and enlistments.' <sup>2</sup>

The soundness of Jefferson's conclusion has never been seriously questioned, and the proposition is now elementary that a neutral may not permit a belligerent either to arm vessels or issue commissions within the neutral jurisdiction. The Convention of 1907 laid it down, in accordance with these principles, that 'corps of combatants cannot be formed, nor recruiting offices opened, on the territory of a neutral power, in the interest of the belligerents' <sup>3</sup> and that 'a neutral power

<sup>1</sup> Canning's *Speeches*, vol. v, pp. 50, 51.

<sup>2</sup> *American State Papers*, i, 116; Moore, *Digest*, vol. vii, § 1293, pp. 880-81. Cf. Wolfius, *Jus gentium*, § 754, and Vattel, *Droit des gens*, III, c. ii, § 15; and cf. also the provision against the fitting out of expeditions contained in § 11 of the Foreign Enlistment Act, 1870.

<sup>3</sup> Art. 4 of Convention V of 1907.

Fitting out  
vessels.

does not incur responsibility by the fact that persons cross the frontier singly in order to place themselves at the service of one of the belligerents.' <sup>1</sup> The analogous rule in maritime warfare is to be found in the provision that 'a neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise or engage in hostile operations, which has been adapted entirely or partly within the said jurisdiction for use in war.' <sup>2</sup>

Supply of  
war material,  
etc.

It has not, however, always appeared equally clear whether the neutral may himself supply arms and military equipment to belligerents. The better opinion has been that such sales are inconsistent with neutral duty in cases where the neutral state is itself the vendor, and the point may probably be regarded as settled by Article 6 of Convention XIII of 1907, quoted above. <sup>3</sup> The Swedish Government acted on this principle in 1825, and cancelled, in deference to a Spanish remonstrance, the sale of six frigates, which had been purchased mediately on behalf of the Mexican insurgents. Similarly, Great Britain, during the American Civil War, stopped the sale of her surplus warships, in order that they might not be acquired, indirectly, by either belligerent party. <sup>4</sup> During the Russo-Japanese War, the Argentine Government cancelled its offer to sell warships to a certain agent, when it ascertained that he, acting ostensibly for Turkey, was really acting for one of the belligerents. <sup>5</sup> The case of neutral individuals who, unlike their Government, are traders in arms, is judged by a correspondingly different standard, a difference which was duly recognised in Art. 7 of the same Convention. Traffic in arms is permitted to such persons, and is powerless to compromise the neutrality of their Government. Thus, in the Russo-Japanese War and in the recent Balkan

<sup>1</sup> Art. 6.

<sup>2</sup> Art. 8 of Convention XIII of 1907. Submarines are included in the term vessel; hence the non-execution of the orders given in Dec. 1914 by one of the belligerents to an American firm (*Amer. Journ. of Int. Law*, vol. ix (1915), p. 177). As to aeroplanes and hydro-aeroplanes, the American Secretary of State held in Jan. 1915, in answer to the German representations, that the existing provisions of law did not apply to them (*ibid.* vol. ix, Supplement, July, pp. 366 seq.).

<sup>3</sup> *Supra*, p. 296.

<sup>4</sup> *Parl. Papers*, 1873, *North America*, No. 2, p. 104.

<sup>5</sup> Takahashi, *Int. Law applied to the Russo-Japanese War*, p. 486.

Wars, large quantities of arms and ammunition were exported to the belligerents by German manufacturers. In the Great War munitions were supplied by American manufacturers to some of the belligerents; and when protests were made in certain quarters, Mr. Bryan, the United States Secretary of State, made the following statement in January, 1915, to the Chairman of the Senate Committee on Foreign Relations: 'There is no power in the Executive to prevent the sale of ammunition to belligerents. The duty of a neutral to restrict trade in munitions of war has never been imposed by international law or by municipal statute. It has never been the policy of this Government to prevent the shipment of arms or ammunition into belligerent territory, except in the case of neighbouring American Republics, and then only when civil strife prevailed.' He added that the Government endeavoured to secure equal treatment to all the belligerents.<sup>1</sup> However, as the supply of arms to one belligerent is clearly injurious to the other, the latter is permitted to repress the traffic on his own behalf. This question belongs therefore to the subject of contraband.

The dividing line between acts which the neutral Government is bound to restrain, and those in which its subjects are permitted to engage at their peril, is not always easy to determine. If such a Government is not bound to prevent its subjects from supplying guns to a belligerent, may it acquiesce in the preparation and sale of an armed vessel under the same circumstances? On principle, the cases are hardly distinguishable. 'There is nothing,' said Story, J., in *The Santissima Trinidad*,<sup>2</sup> 'in the law of nations that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit. . . . It is apparent that though equipped as a vessel of war [the *Independencia*] was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws or our national neutrality.' The difficulty in particular cases is to determine whether the vessel in the circumstances under which it is sold amounts to an 'expedition' which the neutral is bound to restrain, or is merely a contraband article.

The distinction was brought into great prominence at the time of the American Civil War in connection with the notorious *Alabama* case. This vessel, which was evidently intended for war-

Supply of  
armed  
vessels.

The  
*Alabama*  
case.

<sup>1</sup> *The Times*, Jan. 26, 1915, p. 10.

<sup>2</sup> (1822), 7 Wheaton, 346.



like purposes, was launched at Liverpool on May 15, 1862. The United States minister drew the attention of the British Government to the fact that the vessel was intended for the Confederate States, and demanded her arrest. A week later, the law officers of the crown advised that 'if sufficient evidence can be obtained to justify proceedings under the Foreign Enlistment Act, such proceedings should be taken as early as possible.' The difficulty was that the provisions of the existing Foreign Enlistment Act (59 Geo. III, c. 69) were far from satisfactory. Their inadequacy was pointed out in *The Alexandra*<sup>1</sup> by the Court of Exchequer, when an opinion was expressed by Baron Bramwell that the material sections prohibited that equipment only of a vessel by a neutral which was itself such that by means of it the vessel could commit hostilities, and that no equipment which gave no means of attack and defence was within the section. The learned Baron added:<sup>2</sup> 'I think that a vessel departing neither armed nor equipped so as to be capable of attack or defence is not a violation of international law, be its object what it may. . . . I am aware of the consequences if this is the law. A ship may sail from a port ready to receive a warlike equipment; that equipment may leave in another vessel and be transferred to her as soon as the neutral limit is passed or at some not remote port, and thus the spirit of international law may be violated, and the letter and spirit of the municipal law evaded.' Similar views seem to have been taken by the English commissioners of customs in the *Alabama* case. They acted on the assumptions that a ship is *prima facie* a subject of innocent merchandise, that the neutral is only concerned to see that at the time of leaving the territory she is 'incapable of attack and defence,' and that the implements of attack and defence may follow separately from a different part of the neutral territory without a violation of it, provided that the junction does not take place till the neutral zone is crossed. The *Alabama* was allowed to leave for the Azores, where she met the *Bahama* and the *Agrippina*, also from England, from which she obtained crews and military supplies. The English authorities were ignorant of the connection between these vessels and the *Alabama*. The latter vessel received a commission as a Confederate cruiser, and the extent of the destruction which she afterwards wrought on the commerce of the enemy is well within living

<sup>1</sup> *Att.-Gen. v. Sillem* (1863), 2 H. & C. 431; cf. *The Mermaid* (1795), Bee, Am. Adm. Rep. 69.

<sup>2</sup> *Ibid.* at p. 542.

memory. The facts in connection with the *Florida* were very similar. The United States made a heavy claim against the British Government in respect of their alleged default, claiming, in addition to the damages directly occasioned by these vessels, indemnity for—(1) the increased rates of insurance in the United States made necessary by their depredations; (2) the transfer of the American carrying trade to England; (3) the prolongation of the war. After long negotiation it was agreed by the Treaty of Washington in 1871 that the questions at issue between the two countries should be submitted to arbitration. The arbitrators met at Geneva in the same year. In estimating the legal value of their findings, it must not be forgotten that their authority depended merely on the mandate of two individual nations, and that the terms of the reference imposed upon them standards of conduct into the legality of which they were not concerned to inquire. The rules by which their decision was to be guided were contained in Art. 6 of the Treaty, and ran as follows:—

‘A neutral Government is bound—

‘First, To use due diligence to prevent the fitting out, arming, or equipping within its jurisdiction of any vessel which it has reasonable ground to believe is intended to cruise or carry on war against a power with which it is at peace, and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war against a power with which it is at peace, such vessel having been specially adapted, in whole or in part, within such jurisdiction to warlike use.

Rules of the  
Treaty of  
Washington.

‘Secondly, Not to permit or suffer either belligerent to make use of its ports or waters, as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

‘Thirdly, To exercise due diligence in its waters, and as to all persons within the jurisdiction, to prevent any violation of the foregoing obligations and duties.’

The Arbitration Tribunal, on this reference, condemned The award. Great Britain to pay to the United States in respect of the damage done by the *Alabama*, the *Florida* and their tenders, the sum of \$15,500,000. The American claims in respect of indirect damage were rejected at an early stage. The three rules on which the award depended had merely a conventional authority; but the second rule was in effect adopted at the Hague in 1907: ‘Belligerents are forbidden to use neutral

ports and waters as a base of naval operations against their adversaries';<sup>1</sup> and the first rule became Art. 8 of Convention XIII, which has already been set out.<sup>2</sup> The ambiguous phrase 'due diligence' has disappeared, the words 'a belligerent Government is bound to employ the means at its disposal to prevent the fitting out,' etc., taking its place. It is not clear that the new phraseology is much less open to objection than the old; it is still vague and general, and leaves open to dispute such questions as, What were the means at the disposal of the neutral, and what is meant by 'adapted entirely or partly, within the said jurisdiction, for use in war'?

Test of permissible commerce.

The dividing line between legitimate and illegitimate commerce is very difficult to draw in particular cases, but the distinction of principle is less obscure. The export of weapons by neutral subjects is a legitimate branch of commerce, subjecting the goods to seizure as contraband, but in no case involving their Government; on the other hand, a neutral Government is bound to prevent its subjects from handing over a commissioned armed vessel to a belligerent within neutral territory, for to do so is to countenance an expedition.

A tendency has been shown to extend on this point belligerent requirements, and it is likely enough that a violation of the above rules will be held to have taken place where they are verbally observed, but broken in their spirit. An effect of this tendency may be found in the increasing stringency of municipal requirements,<sup>3</sup> and a resolution of the Institute of International Law in 1875 supplies a further illustration.<sup>4</sup>

<sup>1</sup> Art. 5 of Convention XIII of 1907.

<sup>2</sup> See p. 300, *supra*.

<sup>3</sup> The United States, Italy, Austria, Spain and Denmark forbid the equipment of armed vessels for a belligerent; and by section 8 of the Foreign Enlistment Act, 1870, any person commits an offence who (1) 'builds or agrees to build, or causes to be built, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state; or (2) issues or delivers any commission for any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state; or (3) equips any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state; or (4) despatches or causes or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state.'

<sup>4</sup> 'L'État neutre est tenu de veiller à ce que d'autres personnes ne mettent des vaisseaux de guerre à la disposition d'aucun des États belligérants dans ses ports ou dans les parties de mer qui dépendent de sa juridiction.'



The well-known Terceira incident <sup>1</sup> illustrates the principle that a neutral must use reasonable diligence to prevent colour-able violations of its neutrality when the several parts of a hostile expedition, each being in itself innocent, leave the jurisdiction separately and combine outside it. In 1827, during the civil war in Portugal between Donna Maria and Don Miguel, Count Saldanha left England with four ships intended for the service of Donna Maria at Terceira, but bound ostensibly for Brazil. The expedition was unarmed, but military stores also clearing from this country had preceded it. It was intercepted by H.M.S. *Ranger* off Port Praya in Terceira and escorted back. The interference was entirely justifiable in essence, but its exercise in Portuguese sovereignty was itself open to criticism.

Terceira  
incident.

The points which still require treatment in this chapter may be more conveniently dealt with under the correlative head of neutral rights, though the observation of Jefferson already quoted (and embodied in the Convention of 1907 <sup>2</sup>) must not be lost sight of, that if a neutral Government enjoys as regards one of the belligerents a right, it is bound, as regards the other, to enforce it.

Neutral  
rights.

Neutral states are then both entitled and bound to demand that the belligerents shall abstain from hostilities in their territory or their territorial waters,<sup>3</sup> and it is not a hostile act in a neutral if he repels, even by force, an attack upon his neutrality.<sup>4</sup> In 1863 an American man-of-war found and captured the Confederate vessel, *Chesapeake*, off Sambro, a harbour of Nova Scotia. The legality of the act was not seriously maintained, and the American reply to the English complaint could find no better plea in law than that the captain had acted 'under the influence of a patriotic and commendable zeal to bring to punishment outlaws who had offended against the peace and dignity of both countries.' In *The Anna* <sup>5</sup> Lord Stowell directed restitution of a merchant-man captured within three miles of some mud islands situate in the mouth of the Mississippi, but more than three miles from the mainland. 'I am of opinion,' he observed,<sup>6</sup> 'that the privateer has laid herself open to great reprehension. Captains must understand that they are not to station them-

Hostilities in  
neutral  
waters.

<sup>1</sup> Hansard, *Parl. Debates*, new series, vol. xxiii, 737; vol. xxiv, 126; Cobbett, *Cases*, vol. ii, p. 310.

<sup>2</sup> Art. 5 of Convention V.

<sup>3</sup> As to the attack on the German cruiser *Dresden* by a British squadron in Chilean territorial waters in March, 1915, see *supra*, p. 294n.

<sup>4</sup> Art. 10.

<sup>5</sup> (1805), 5 C. Rob. 373.

<sup>6</sup> *Ibid.* p. 385e.

selves in the mouth of a neutral river, for the purpose of exercising the rights of war from that river, much less in the very river itself.' But the capture of a prize in violation of neutrality is valid as between the belligerents themselves; it rests with the state whose neutrality has been violated to claim restitution.<sup>1</sup> In 1907 it was agreed that if the prize is still within its jurisdiction, that state must employ the means at its disposal to release it, with its officers and crew, and to intern the prize crew; if it is not within the jurisdiction, the captor must, at the neutral's demand, release it.<sup>2</sup> Whether the right of the neutral in such a case is overridden by condemnation, or by sale to an innocent third party, has been regarded as uncertain; but the better view is that it is not.<sup>3</sup>

Pursuit in  
neutral  
waters.

Bynkershoek<sup>4</sup> suggested a qualification to the above rule against the exercise of hostilities in neutral waters, which has never prevailed, though it has been sometimes relied on. He expressed the opinion that the belligerent might legally push home to neutral waters a chase commenced in the open sea. He might finish his capture *dum fervet opus* (while the chase is hot). The alleged exception is unsupported by authority, though in *The Anna*<sup>5</sup> Lord Stowell was prepared to admit that it would be pardonable in a cruiser, which had summoned a vessel to stand by, to pursue that vessel if it fled to within three miles of uninhabited mud flats technically forming part of neutral territory. But the exception would be a dangerous precedent to admit, and it would not now be regarded as admissible. It may therefore be stated as a definite rule that to enter voluntarily into neutral territory for the purpose of engaging in hostilities is unlawful. 'When the fact is established,' observed Lord Stowell, 'it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding that it may actually belong to the enemy.'<sup>6</sup>

Indemnity.

A belligerent who has suffered from a violation of neutral territory by his enemy is entitled to demand that the neutral shall take such steps to procure an indemnity as he might reasonably be expected to adopt, having regard to the circumstances, in a case in which his own interests were involved.

<sup>1</sup> Westlake, Part II, p. 228.

<sup>2</sup> Art. 3 of Convention XIII. The neutral power would have a right of appeal in this case to the proposed new International Prize Court. See p. 327, *infra*.

<sup>3</sup> Westlake, Part II, p. 228; and Hall, 7th ed. p. 666.

<sup>4</sup> *Quæstiones juris publici*, i, 8.

<sup>5</sup> (1805); 5 C. Rob. 373.

<sup>6</sup> *The Vrow Anna Catharina* (1806), 5 C. Rob. 15. Cf. *The Lokken* (1918), *The Times*, July 27, 1918.

If a belligerent vessel captured in neutral waters was itself the first to open hostilities, it of course loses all claim upon the neutral for redress; if, being first attacked, it merely defends itself, the position is not so clear. In *The Anne*<sup>1</sup> self-defence was apparently regarded as justifiable,<sup>2</sup> and in the case of *The General Armstrong* (1814)<sup>3</sup> it appears that the captured vessel was the first to fire, and, though having time to apply to the neutral for protection, it neglected to do so, and was held to have thereby released the neutral from all obligation. This case, therefore, quoted by Hall<sup>4</sup> in support of the proposition that 'a belligerent who, when attacked in neutral territory, elects to defend himself, instead of trusting for protection or redress to his host, by his own violation of sovereignty frees the neutral from responsibility,' hardly supports that proposition; and the better view is that expressed by Westlake,<sup>5</sup> that the threatened vessel must give the neutral, if possible, an opportunity of doing his duty either by force or by peaceful means. If there is no time for this, or the neutral disregards the appeal, it is hardly reasonable to expect the threatened vessel to submit quietly to capture.<sup>6</sup>

Self-defence  
in neutral  
waters.

A neutral is allowed, consistently with his continuing friendship towards both belligerents, to receive their troops or vessels within his territory in circumstances which ensure that the use of his hospitality will be unaggressive in its direct and indirect results. In these circumstances a French army sought and obtained shelter in Switzerland in 1871. Such reception is properly conditioned, in the case of land forces, upon an agreement by the fugitives to undergo disarmament in crossing the frontier, and internment within the neutral territory, as long as hostilities last.

Right of  
asylum.

By the Convention of 1907 the neutral must intern such troops, so far as possible, at a distance from the theatre of war, and may keep them in camps or even confine them in fortresses or places appropriated to the purpose; he may at his discretion release the officers on parole not to leave the neutral territory without permission. He must (in default of a special Convention on the subject) furnish them with food,

<sup>1</sup> (1818), 3 Wheaton, 435, 447.

<sup>2</sup> And cf. Westlake, Part II, p. 232, where this view is taken.

<sup>3</sup> Wheaton (ed. Phillipson), p. 657.

<sup>4</sup> 7th ed. p. 668.

<sup>5</sup> Part II, p. 232.

<sup>6</sup> See also the case of *The Ryeshitelmi* (1904), during the Russo-Japanese War, Takahashi, *op. cit.* pp. 437 seq.; Smith and Sibley, *op. cit.* pp. 116 seq.; Cobbett, *Cases*, vol. ii, pp. 295 seq.



clothing and the relief which humanity dictates (being entitled to reimbursement at the conclusion of peace); and he may allow the sick or wounded to pass over his territory, provided that the trains bringing them carry neither *personnel* nor material of war, and must adopt towards them such measures of safety and control as may be necessary. Wounded and sick brought into neutral territory by one of the belligerents, and belonging to the other, must be prevented by the neutral from taking further part in the operations of war; and the same duty devolves on the neutral with regard to wounded or sick of the other army who may be committed to his care. Generally, the Geneva Convention applies to the sick and wounded interned in neutral territory.<sup>1</sup>

Belligerent  
ships in  
neutral ports

In the case of maritime warfare, the requirements of neutral hospitality are less exacting, though recently there has been a tendency to approximate the rules on sea to those on land. It was fairly generally agreed, up to the time of the Russo-Japanese War, that a belligerent vessel might take refuge in a neutral harbour without any obligation to disarm; and might there repair and obtain supplies and coal sufficient to carry her to the nearest port in her own country. In the words of Mr. Hall: <sup>2</sup> 'To disable a vessel, or to render her permanently immovable, is to assist her enemy; to put her in a condition to undertake offensive operations is to aid her country in its war. The principle is obvious; its application is susceptible of much variation; and in the treatment of ships, as in all other matters in which the neutral holds his delicate scale between two belligerents, a tendency towards the enforcement of a harsher rule becomes more defined with each successive war.' The principle that the vessel shall be enabled to reach the nearest port in her own country appears in the British Order in Council of 1862, with the addition that coal was only to be supplied to the same ship once in three months; <sup>3</sup> and it was adopted by Great Britain during the Franco-German (1870-71), the Spanish-American (1898), and the Russo-Japanese War (1904). But a further step was taken by Great Britain in 1904, when, by the Declaration of the Governor of Malta, <sup>4</sup> a belligerent fleet proceeding to the seat of war, and belligerent vessels whose object was to intercept neutrals conveying contraband, were prohibited from coaling at all in British waters, unless in distress.

<sup>1</sup> Arts. 11-15 of Convention V of 1907.

<sup>2</sup> 7th ed. p. 670.

<sup>3</sup> Smith and Sibley, *International Law as Interpreted during the Russo-Japanese War*, 2nd ed. pp. 133, 134.

<sup>4</sup> *Ibid.* p. 135.

The right of taking refuge in neutral ports was also subject to special conditions when vessels belonging to two belligerents happened to meet in the same neutral port. Early in the eighteenth century the practice sprang up of detaining a privateer for twenty-four hours after the departure of its enemy; while in the case of a regular warship it was a common custom to require the word of the commander that he would not attack an enemy vessel which had left the same port shortly before.<sup>1</sup> The twenty-four hours' rule, however, became one of general application, and was to be found in treaties as well as in regulations and declarations.<sup>2</sup> But it lent itself to abuse, as was illustrated by the *Tuscarora*, in 1861; which practically blockaded the *Nashville* in Southampton, by remaining under steam, leaving the harbour whenever the latter vessel showed signs of moving, and returning before the twenty-four hours had expired.<sup>3</sup> This manœuvre was met by the Order in Council of 1862, which required a belligerent war vessel to leave within twenty-four hours of arrival, 'except in case of stress of weather, or of her requiring provisions or things necessary for the subsistence of her crew, or repairs'; in which latter cases she was to leave as soon as possible. This rule was subsequently adopted even by the United States, but was never accepted by Germany, France or Russia.<sup>4</sup>

Vessels of two belligerents in a neutral port.

During the Russo-Japanese War there took place several events which appeared to be a great extension of the limits of neutral duty; but may have been merely illustrations of the principle that a vessel taking refuge in a neutral port must leave within twenty-four hours, or so soon after that period as possible. Several Russian vessels were dismantled and disarmed by neutrals; for instance, a gunboat, the *Mandjur*, a destroyer, the *Grossovoi*, and a cruiser, the *Askold*, at Shanghai; a cruiser, the *Diana*, at Saigon, and a battleship, the *Tsarevitch*, and some destroyers at Kiao-Chau. In most of the cases the crews were interned till the end of the war.<sup>5</sup> But that

<sup>1</sup> Hall, p. 672; Smith and Sibley, *ibid.* pp. 132, 133.

<sup>2</sup> Cf. Westlake, Part II, p. 237.

<sup>3</sup> Smith and Sibley, *International Law as Interpreted during the Russo-Japanese War*, 2nd ed. p. 134; Hall, p. 673.

<sup>4</sup> Pearce Higgins, *The Hague Peace Conferences*, p. 470. Professor Westlake points out (Part II, pp. 238, 239) that the British rule does not confer any right of asylum even for twenty-four hours, and that a neutral is left free by it to refuse such asylum altogether in the case where the belligerent vessel is in flight from its enemy; in which case internment for the rest of the war would be the proper course. The point, however, is not one of much practical importance; a vessel in such a condition would, in very few cases, be able or willing to leave in twenty-four hours, and if it stayed longer, its internment would naturally follow.

<sup>5</sup> Cf. Hall, p. 670; Smith and Sibley, *ibid.* p. 136.

departure within a short period was allowed as an alternative to disarmament, is shown by the case of the *Novik*, which was allowed to leave Tsing-tau after a stay of ten hours, and the option of departure or disarmament which was given to the cruisers, the *Aurora*, *Oleg* and *Zamitchug*, at Manilla, and to a transport, the *Lena*, at San Francisco; this vessel being ultimately, by agreement, disarmed. The Japanese carried the claim to have vessels in such circumstances disarmed so far as to enter a Chinese port and capture a Russian destroyer, the *Ryeshitelni*, lying there; but the neutrality of China was not treated very seriously by either belligerent. It is to be noted, too, that certain states (Norway, Sweden and Denmark) closed certain ports to belligerent warships altogether, except in cases of distress.<sup>1</sup>

The Hague  
rules.

At the Hague, in 1907, the whole question received very elaborate consideration, and a body of rules was agreed upon which, in substance, confirmed the legality of what had taken place during the recent war. The capture of the *Ryeshitelni* was, it is true, disapproved by the Article forbidding any act of hostility, including capture and search, in neutral waters;<sup>2</sup> and no other conclusion could well be reached on that point. But after laying stress upon the necessity for impartial treatment of the two belligerents (reserving, however, to a neutral the right to close its ports to a belligerent vessel which has failed to conform to its orders or regulations, or has violated neutrality<sup>3</sup>), the Conference agreed that 'the neutrality of a power is not affected by the mere passage through its territorial waters of warships or prizes belonging to belligerents'<sup>4</sup> and that 'a neutral power may allow belligerent warships to employ its licensed pilots.'<sup>5</sup> Whether a neutral may forbid the 'innocent passage' of belligerent war vessels was left undecided, the general feeling being that such prohibition was lawful, if necessary for the maintenance of neutrality, except in the case of straits uniting two open seas.<sup>6</sup> But the United States put in a general objection to Art. 10, and Turkey and Japan declined to bind themselves to recognise an exception relative to straits between open seas.

Length of  
stay.

There followed the more difficult question of the length of stay permitted in neutral ports.<sup>7</sup> After considerable difference of opinion the rules ultimately adopted were of the

<sup>1</sup> Pearce Higgins, *The Hague Peace Conferences*, p. 460.

<sup>2</sup> Art. 2 of Convention XIII.

<sup>3</sup> Art. 9.

<sup>4</sup> Art. 10.

<sup>5</sup> Art. 11.

<sup>6</sup> *Parl. Papers*, Misc. No. 4, 1908, p. 240; and cf. Pearce Higgins, *ibid.* p. 468.

<sup>7</sup> As to the recent Regulations of states respecting the visits of men-of-war to foreign ports, see *Amer. Journ. of Int. Law*, vol. x (1916), *Supp.* pp. 121-178.



nature of a compromise, to the effect that unless a neutral made special provision to the contrary, belligerent warships were not to remain in neutral ports, roadsteads or territorial waters for more than twenty-four hours;<sup>1</sup> that the neutral must order the vessel to depart within that time, or such time as may be fixed by the local law,<sup>2</sup> and that only damage or stress of weather could justify a more prolonged stay.<sup>3</sup> An exception was made for the case of warships exclusively devoted to religious, scientific or philanthropic missions.<sup>4</sup> The same compromise between a fixed rule and freedom of action to the neutral is seen in the provision that, in default of special dispositions to the contrary by the neutral, the maximum number of warships belonging to a belligerent which may be in a neutral port or roadstead shall be three.<sup>5</sup> The existing practice is adopted in the rule that when warships of both belligerents are present together in a neutral port or roadstead, not less than twenty-four hours must elapse between the departure of the one and the departure of the other, the order of departure being determined by the order of arrival, unless the ship which arrived first is so circumstanced that an extension of its stay is permissible; and a belligerent warship was (as was suggested by the 'Institut de Droit International' in 1898) forbidden to leave for twenty-four hours after the departure of a merchant ship flying the flag of its adversary.<sup>6</sup> These provisions involve, of course, in certain cases exceptions to the rule against staying for more than twenty-four hours.

Further, an attempt was made to define the limits within which belligerent warships may take advantage of their stay. In neutral ports and roadsteads they may only carry out such repairs as are absolutely necessary to render them seaworthy, and may not add in any way to their fighting force; the decision as to what repairs are necessary being left to the local authorities.<sup>7</sup> They may not use neutral ports, roadsteads or territorial waters for replenishing or increasing their supplies of war material or their armaments, or for completing their crews;<sup>8</sup> they may only revictual in neutral ports or roadsteads to bring up their supplies to the peace standard.<sup>9</sup> The question of coaling caused some difficulty; and the rule in its final form did not meet with unanimous acceptance. It was provided first that such vessels may only ship sufficient fuel to enable them to reach the nearest port in their own country, and this was in accord with the British view; but the Article proceeds:

What war-ships may do.

<sup>1</sup> Art. 12.

<sup>2</sup> Art. 13.

<sup>3</sup> Art. 14.

<sup>4</sup> Art. 14.

<sup>5</sup> Art. 15.

<sup>6</sup> Art. 16.

<sup>7</sup> Art. 17.

<sup>8</sup> Art. 18.

<sup>9</sup> Art. 19.

'They may, on the other hand, fill up their bunkers built to carry fuel, when they are in neutral countries which have adopted this mode of determining the amount of fuel to be supplied.' This represented the German, French and Russian view. It was added that 'if, in accordance with the law of the neutral power, the ships are not supplied with coal within twenty-four hours of their arrival, the duration of their permitted stay is extended by twenty-four hours.'<sup>1</sup> Great Britain and Japan objected to the provision which enabled a belligerent vessel to obtain its full complement of coal, and refused to accept this Article; and the whole Convention has not been signed by the United States.<sup>2</sup> The rule which, as we have seen, was laid down by Great Britain in 1862,<sup>3</sup> was adopted in the provision that a belligerent war vessel which has shipped fuel in a port belonging to a neutral power may not replenish its supply within three months in a port of the same power;<sup>4</sup> but this was not accepted by Germany.

Measures to  
be taken by  
neutral.

Finally, it was agreed that if, notwithstanding a notification by a neutral power, a belligerent warship does not leave a port where it is not entitled to remain, the neutral may take such measures as it considers necessary to render the ship incapable of putting to sea so long as the war lasts, and the commanding officer of the ship must facilitate the execution of such measures; that, when the ship is detained, the officers and crew are to be detained either in it, or in another vessel, or on land, and subject to such restrictions as may appear necessary, with power to release the officers on parole not to quit the neutral territory without leave;<sup>5</sup> that the neutral is bound to exercise such vigilance as the means at its disposal permit to prevent any violation of the provisions agreed upon;<sup>6</sup> and that the exercise by the neutral of the powers given by the present Convention are in no circumstances to be considered as an unfriendly act by a belligerent who has accepted the Articles relating thereto.<sup>7</sup>

<sup>1</sup> Art. 19.

<sup>2</sup> See Pearce Higgins, *The Hague Peace Conferences*, p. 477.

<sup>3</sup> See p. 309, *supra*.

<sup>4</sup> Art. 20.

<sup>5</sup> Art. 24.

<sup>6</sup> Art. 25; and cf. rule 3 of the Treaty of Washington, p. 303, *supra*.

<sup>7</sup> Art. 26. During the Great War, German warships and auxiliary cruisers were interned by various neutral states for not leaving within the twenty-four hours or other period fixed; e.g. by the United States, Norway, Sweden, Chile, Brazil. Certain powers made special regulations in regard to the admittance of belligerent submarines within their territorial waters; e.g. Norway (*Amer. Journ. of Inter. Law*, vol. xi (1917), p. 147; Special Supplement, Oct. 1916, p. 342); Sweden (*Parl. Papers, Misc. No. 8* (1917)); Spain (*The Times*, July 2, 1917).

It follows naturally from the exclusiveness of national sovereignty that if a belligerent brings his prisoners within neutral territory, they instantly recover their freedom. This fact was well expressed by an Austrian ordinance of 1803: '... aussitôt que ... prisonniers [de guerre] auraient mis le pied sur le territoire d'un souverain neutre ou ami de leur gouvernement ils devront être regardés comme libres, et toutes les autorités civiles et militaires leur devront, sous ce rapport, protection et assistance.' By Convention V of 1907, it was agreed that 'a neutral power which receives prisoners of war who have escaped shall leave them at liberty. If it allows them to remain in its territory, it may assign them a place of residence. The same rule is applicable to prisoners of war brought by troops taking refuge in the territory of a neutral power;' <sup>1</sup> for when the captors are compelled to fly to neutral territory for safety, they clearly must be taken to have lost their right to retain their prisoners.

Prisoners in  
neutral  
territory.

This principle, however, is not carried to its logical conclusion in the case of prizes taken by belligerents into neutral harbours. In these cases the title of the captor is not necessarily complete. Mere seizure of enemy property is not now regarded by the British Prize Courts as sufficient, even as against the enemy, for transferring the ownership thereof to the captor; <sup>2</sup> and so far as the rights of other persons (*e.g.* recaptors) are concerned, ownership may, according to the views of some nations, but not Great Britain, which would look only to condemnation by a proper Court, pass in accordance with the tests of twenty-four hours' possession or removal to a place of safe custody; <sup>3</sup> and, in the case of neutral property, title can be only completed by the judgment of a competent prize court. The belligerent, therefore, on taking prizes into neutral ports, in certain cases, in Mr. Hall's words, 'brings there property which does not yet belong to him; in other words, he continues the act of war through which it has come into his power.' <sup>4</sup> The anomaly by which permission is granted to do this is noted by Phillimore. <sup>5</sup> 'An attentive review of all the cases decided in the courts of England and the North American United States during the last war (1793-1815), leads

Prizes in  
neutral  
ports.

<sup>1</sup> Art. 13.

<sup>2</sup> Cf. *The Odessa* (1915), 1 P.C. 554, at p. 559, where Lord Mersey, delivering the judgment of the Privy Council, said: 'The effect of a condemnation is to divest the enemy subject of his ownership as from the date of the seizure, and to transfer it, as from that date, to the Sovereign or to his grantees.' See further, *infra*, p. 419.

<sup>3</sup> Hall, pp. 482 *seq.*

<sup>4</sup> *Id.* p. 660.

<sup>5</sup> iii, § 379.



to the conclusion that the condemnation of a capture by a regular prize court, sitting in the country of the belligerent, of a prize lying at the time of the sentence in a neutral port, is irregular, but clearly valid.' But neutrals have become very reluctant to grant the shelter of their harbours to belligerents' prizes, so that instances of this irregular practice are likely to be rare in the future; and the question was dealt with by Convention XIII of 1907.

The Hague  
rules.

It was first agreed, as we have seen (and the point was beyond dispute), that a national prize court cannot be established by a belligerent on neutral territory, or on a vessel in neutral waters,<sup>1</sup> and that the neutrality of a power is not affected by the mere passage of prizes belonging to belligerents through its territorial waters.<sup>2</sup> The general principle was then laid down that 'a prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions. It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew, and to intern the prize crew.'<sup>3</sup> Release of the prize was also to follow in the case of one brought into a neutral port in circumstances other than those referred to.<sup>4</sup> But to this rule an exception was made: 'A neutral power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered, pending the decision of a prize court. It may have the prize taken to another of its ports. If the prize is convoyed by a warship, the prize crew may go on board the convoying ship. If the prize is not under convoy the prize crew are left at liberty.'<sup>5</sup> This Article, proposed with the object of reducing the danger of the destruction of prizes, was not agreed to by Great Britain and Japan on the ground that it made no reference to the fundamental distinction between enemy and neutral prizes, that its value in preventing the destruction of neutral prizes was doubtful, and that it placed too heavy a burden upon the neutral.<sup>6</sup> It would also give authority to the practice described by Phillimore as 'irregular';<sup>7</sup> and Great Britain

<sup>1</sup> Art. 4.

<sup>2</sup> Art. 10.

<sup>3</sup> Art. 21.

<sup>4</sup> Art. 22.

<sup>5</sup> Art. 23. As this Article was not accepted by the United States, the American Supreme Court ordered, March, 1917, the release of the *Appam*, a British vessel that had been brought by a German captor into an American port: *Amer. Journ. of Int. Law*, April, 1917, p. 443.

<sup>6</sup> *Parl. Papers, Misc. No. 4* (1908), p. 252.

<sup>7</sup> See p. 313, *supra*.

was unwilling to admit any relaxation of her rule that a neutral prize must be taken by the captor into one of his own ports or released.<sup>1</sup> But even in the view of those states that accept this Article, it remains entirely in the discretion of the neutral whether prizes are admitted in this way or not.<sup>2</sup>

Opinion has varied on the question whether a neutral may properly permit a belligerent army to pass through his territory. Such a permission was formerly held to be consistent with neutral duty, though later writers added the requirement that the right must be equally conceded to both belligerents. The qualification is not perhaps very reasonable, for it may very easily happen that a passage through neutral territory which is of importance to one belligerent offers no advantage whatever to the other. A belligerent will hardly demand leave to pass through such territory unless he hopes to derive some military advantage therefrom. It follows that the permission to do so is unneutral. Vattel's general statement<sup>3</sup> of the duties of a neutral is accurate, with a single exception, and it is decisive upon the point: A neutral is bound not to give any assistance, except where there is a previous stipulation, nor of its own will to furnish troops, arms, ammunition or anything of direct use in war. He adds that to give assistance equally is absurd; a state cannot equally assist two enemies. The same things, the same number of troops, the like quantity of arms and of munitions furnished under different circumstances, are no longer equivalent succours.

Passage  
through  
neutral  
territory.

This view has prevailed in later times, and Phillimore<sup>4</sup> alone of modern writers supports the legality of conceding military passage. It will be noticed that Vattel makes a reservation in favour of the neutral when assistance is given pursuant to an existing treaty, and Mr. Hall notes that the question might still arise in Europe, for the railway from Constance to Basle, which leads from the interior of Germany to the Rhine, passes through the canton Schaffhausen, and Germany has a right of military passage over it. The question arose in the South African War. Sir Frederick Carrington was permitted to land at Beira in Portuguese territory with a British

<sup>1</sup> See p. 425, *infra*.

<sup>2</sup> In case a neutral state permits a prize to remain in its port for a period longer than is sanctioned by international law or other provisions, the captor's prize court is not on that account empowered or obliged to release the prize: *The Sudmark* (No. 2) (1917), 2 P.C. 473 (affirming the decision of the Supreme Court for Egypt in Prize). The Dutch Government regards prizes, even after due condemnation, as belligerent vessels unless they have been transferred to a neutral flag: *Parl. Papers, Misc.* No. 12 (1918).

<sup>3</sup> *Droit des gens*, liv. iii, chap. 7, § 104.

<sup>4</sup> iii, § 153.

force on its way to Rhodesia. It appears that the Transvaal Government protested against the concession, which was defended by the Portuguese ministry in the course of debate, on the ground that England had stipulated for the right of passage in existing treaties. On principle this line of defence does not appear to be satisfactory. As between one belligerent A and a neutral C, it is either illegal for C to give B, the other belligerent, a right of passage, or it is not. If it is not, *cadit quæstio*; if it is, how can C defend himself to A by the plea that he was under contract to perform an illegal act? <sup>1</sup>

When belligerent forces unlawfully enter neutral territory, and the neutral Government does not or cannot expel them, the other belligerent is justified in entering the neutral territory for the purpose of preventing the violation from operating to his disadvantage; in other words, he may enter only on clear grounds of self-defence and self-preservation.<sup>2</sup>

The Hague Conference, then, adopted the better view in the Article already referred to,<sup>3</sup> which forbade the passage of troops or convoys across neutral territory.

Wireless  
telegraphy.

It was also agreed that belligerents may not (and neutrals ought not to allow them to) erect on the territory of a neutral a wireless telegraphy station or any apparatus intended to serve as a means of communication with belligerent forces on land or sea, or make use of any installation of this kind established by them before the war on the territory of the neutral power for an exclusively military end, and which has not been opened for the service of public correspondence.<sup>4</sup> But a neutral power is not bound to forbid or restrain the use, for belligerents, of telegraph or telephone cables, or of wireless telegraphy apparatus, whether belonging to the neutral power or to companies or private individuals,<sup>5</sup> and

<sup>1</sup> Cf. p. 295, *supra*.

<sup>2</sup> Cf. the statement of Daniel Webster, American Secretary of State, in the case of *The Caroline* (1841), Moore, *Digest*, vol. ii, § 217: neutral territory may be entered when there is a 'necessity of self-defence, instant, overwhelming, and leaving no choice of means and no moment for deliberation.' The last condition, however, as to no moment for deliberation, is much too stringent for practical purposes, and can scarcely be regarded as being indispensable.

<sup>3</sup> Art. 2 of Convention V.

<sup>4</sup> Arts. 3, 5 of Convention V of 1907.

<sup>5</sup> Art. 8. The Report of the Hague Committee observes that there is no contradiction between Art. 3 and Art. 8. Art. 3 'contemplates the installation of a station or an apparatus by the belligerent parties on the territory of the neutral state, or the use of a station or apparatus installed by them there during peace, for an exclusively military purpose and without being opened to the public. Art. 8, on the other hand, refers to an apparatus used for the public service, and administered either by the neutral state or by a company or individuals.'



any prohibition or restraint it imposes must be applied uniformly to both belligerents.<sup>1</sup> The importance of the agreement forbidding the erection of wireless telegraphy apparatus on neutral territory is emphasised by the fact that Russia during the siege of Port Arthur erected and used a station on Chinese territory, though obviously the violation of Chinese neutrality was as clear as if a body of troops had taken up a position there.<sup>2</sup> In relation to maritime warfare, a similar provision was agreed upon: 'belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries; in particular, they may not erect wireless telegraphy stations, or any apparatus for the purpose of communicating with the belligerent forces on land or sea.'<sup>3</sup>

In November, 1914, during the Great War, Great Britain and France having protested against the reported use by Germany of the wireless installations in Ecuador and Colombia, the Governments of the latter gave assurances that every effort was made to safeguard their neutrality and prevent the acts alleged.

A question of difficulty arises in continental warfare with regard to neutral railway material found on belligerent territory. The Conference arrived at a somewhat vague compromise between the views of those who denied the belligerents' right of requisition at all, and those who claimed the right—sometimes designated the right of angary—subject to the payment of indemnity: 'Railway material coming from the territory of neutral powers, whether it be the property of the said powers or of companies or private persons, and recognisable as such, shall not be requisitioned or utilised by a belligerent, except in so far as is absolutely necessary. It shall be sent back as soon as possible to the country of origin. A neutral power may likewise in case of necessity retain and utilise, to a corresponding extent, railway material coming from the territory of the belligerent power. Compensation shall be paid on either side in proportion to the material used and to the period of usage.'<sup>4</sup>

'Necessity' is, of course, an elastic term; and it is not very easy to see how a neutral in time of peace will often be able to establish such necessity as would justify the seizure of the property of a friendly nation, or of its subjects, and there would seem to be a danger of such right of seizure degenerating

<sup>1</sup> Art. 9.

<sup>2</sup> Pearce Higgins, *The Hague Conferences*, p. 291.

<sup>3</sup> Art. 5 of Convention XIII of 1907.

<sup>4</sup> Art. 19.

into something very like reprisals; though its intention is merely to allow the neutral to fill up the place of the rolling stock the belligerent has seized.<sup>1</sup>

The modern  
right of  
angary.

The earlier right of angary—*jus angariæ*—was a right claimed by 'a belligerent deficient in vessels to lay an *embargo* on and seize neutral merchantmen in his harbours, and to compel them and their crews to transport troops, ammunition and provisions to certain places on payment of freight in advance.'<sup>2</sup> On the other hand, the modern right of angary 'consists in the right of belligerents to make use of, or destroy in case of necessity, *for the purpose of offence and defence*, neutral property on their own or on enemy territory or on the open sea.' 'All sorts of neutral property, whether it consists of vessels or other means of transport, or arms, ammunition, provisions or other personal property, may be the object of the right of angary, provided the articles concerned are serviceable to military ends and wants.'<sup>3</sup>

This right of angary was considered by the Privy Council in 1916, when the Crown claimed to requisition neutral property that was taken in prize and brought within the jurisdiction of the Prize Court.<sup>4</sup> Lord Parker, delivering the judgment of the Court, dealt with the history of the question. He recalled the exercise of the right by Germany in the Franco-German War of 1870, when the German military authorities seized six British vessels and sank them in the Seine to prevent the approach of the enemy, and when they seized also Austrian rolling-stock and utilised it for the transport of troops and munitions of war. Bismarck justified the action on the ground 'that a pressing danger was at hand, and every other means of arresting it was wanting; the case was therefore one of necessity . . .' and he referred to the authority of Phillimore.<sup>5</sup> The latter admits the right only in case of 'extreme necessity,' and agrees with G. F. de Martens<sup>6</sup> and Gessner;<sup>7</sup> but Azuni<sup>8</sup> thinks it may be exercised in case of necessity or public utility, *i.e.* when it is highly convenient to the belligerent power—a view supported by Bluntschli,<sup>9</sup> and by a British prize decision.<sup>10</sup>

Again, the power to requisition ships and goods of neutrals

<sup>1</sup> *Parl. Papers, Misc. No. 4* (1908), p. 140.

<sup>2</sup> Oppenheim, vol. ii, p. 446.

<sup>3</sup> *Ibid.* p. 447.

<sup>4</sup> *The Zamora* (1916), 2 P.C. 1.

<sup>5</sup> Vol. iii, § 29, p. 50.

<sup>6</sup> *Law of Nations* (Eng. trans. 1802), bk. viii, chap. 6, § 7, p. 326.

<sup>7</sup> *Droits des neutres* (2nd ed. Berlin, 1876), p. 154.

<sup>8</sup> *Droit maritime de l'Europe*, vol. i, chap. 3, § 5.

<sup>9</sup> *Droit international*, § 795 bis.

<sup>10</sup> *The Curlew*; *The Magnet* (1812), Stewart, Vice-Admiralty Cases (Nova Scotia), 312.

in the custody of the Prize Court pending adjudication was exercised by the United States in the Civil War of 1861.<sup>1</sup>

After distinguishing the right of pre-emption<sup>2</sup> from the right of requisitioning the vessels or goods of neutrals, the judgment of their Lordships was expressed in the following terms: 'A belligerent power has by international law the right of requisitioning vessels or goods in the custody of its Prize Court pending a decision of the question whether they should be condemned or released, but such right is subject to certain limitations. First, the vessel or goods in question must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security; secondly, there must be a real question to be tried, so that it would be improper to order an immediate release; and thirdly, the right must be enforced by application to the Prize Court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable.'<sup>3</sup>

Further, in the early part of 1918 Great Britain and the United States legitimately had recourse to the right of angary in the case of property not in the custody of the prize court, by requisitioning a number of Dutch vessels that were in British and American ports.<sup>4</sup>

<sup>1</sup> As to goods, see *The Memphis* (1862), Blatch. 202; *The Ella Warley* (1862), Blatch. 204; *The Stephen Hart* (1863), Blatch. 387. As to vessel, see *The Peterhoff* (1866), Blatch. 381.

<sup>2</sup> See *infra*, p. 350.

<sup>3</sup> *The Zamora* (1916), 2 P.C. at p. 26. A similar decision was pronounced by the Privy Council in *The Canton* (1916), 2 P.C. 264, affirming the rule in *The Zamora*.

<sup>4</sup> Cf. *Parl. Papers, Misc. No. 11* (1918).



## CHAPTER II

### BELLIGERENT GOVERNMENTS AND NEUTRAL INDIVIDUALS

General  
principles.

THIS branch of international law has been produced by the compromise between two irreconcilable principles, which may be generally stated as follows:—

- (1) Neutrals are entitled to prosecute their trade during the continuance of war.
- (2) Belligerents are entitled, for military purposes, to exercise a quasi-penal surveillance over certain forms of such trade.<sup>1</sup>

Trade of  
neutrals.

It is important to notice carefully the legal character of acts which are prohibited under this head. The simplest illustration is furnished by the trade in contraband goods. *Prima facie*, a neutral power has as good a right to carry on its trade with each of two belligerents during war as it possessed before its outbreak. Its friendship towards both parties continues, and it has, in a general way, full liberty to profit by the rise in market prices which commonly follows upon the outbreak of war. It was, however, long ago recognised that an indiscriminating licence to neutral traders was hardly to be reconciled with belligerent necessity. A state which had gradually exhausted the military supplies of its opponent could not tolerate their unrestricted renewal at the hands of neutral traders. At this point the rights of neutrals have definitely given way before those of belligerents. It is not, however, accurate to state that contraband trading and the running of blockades are illegal acts. The prohibition is relative, not absolute. In no case do such acts compromise the neutral Government, and the latter is neither legally nor morally constrained to discourage its subjects from engaging in them.

The correct view was very clearly laid down by Lord

<sup>1</sup> Cf. the retaliatory Order in Council of March 11, 1915, of which Art. 3 provided: 'Every merchant vessel . . . on her way to a port other than a German port, carrying goods with an enemy destination, or which are enemy property, may be required to discharge such goods in a British or allied port'; and in *The Stigstad* (1916), 2 P.C. 179, it was held that this Order was not invalid by reason of the fact that it caused inconvenience to neutral shipowners, and if the Order is carried out in a reasonable and proper way, neutrals are not entitled to compensation. See also *The Zamora* (1916), 2 P.C. 1; *The Leonora and other vessels* (1918), 34 T.L.R. 366. But such an Order would not be justified otherwise than as a retaliatory measure.

Westbury: <sup>1</sup> ' In the view of international law, the commerce of nations is perfectly free and unrestricted. The subjects of each nation have a right to interchange the products of labour with the inhabitants of every other country. If hostilities occur between two nations, and they become belligerents, neither belligerent has a right to impose, or to require a neutral Government to impose, any restrictions on the commerce of its subjects. The belligerent power certainly acquires certain rights, which are given to it by international law. One of these is the right to arrest and capture, when found on the sea, the highroad of nations, any munitions of war which are . . . in the act of being transported in a neutral ship to its enemy. This right, which the laws of war give to a belligerent for his protection, does not involve as a consequence that the act of the neutral subject in so transporting munitions of war to a belligerent country is either a personal offence against the belligerent captor, or an act which gives him any ground of complaint either against the neutral trader personally or against the Government of which he is a subject. The right of the belligerent is limited entirely to the right of seizing and condemning as lawful prize the contraband articles. He has no right to inflict any punishment on the neutral trader, or to make his act a ground of representation or complaint against the neutral state of which he is a subject. In fact, the act of the neutral trader in transporting munitions of war to the belligerent country is quite lawful, and the act of the other belligerent in seizing and appropriating the contraband articles is equally lawful.'

In the case of contraband carriage, the noxiousness springs from the nature of the merchandise, whereas a declaration of blockade entirely withdraws from trade a particular area, and applies indifferently to all kinds of goods. In both cases, however, the controlling principle is identical. The right of the belligerent to carry his operations to a successful issue is allowed to override the rights normally belonging to the status of neutrality. The concession is a bare one, and attempts to extend it are likely to be jealously watched by neutrals in future warfare. Two such attempts have given rise at different times to practices which are very familiar, and one at least of which appears to have established itself. The practices in question are that of commercial blockade, and that which is known as the rule of war of 1756.

<sup>1</sup> *Ex parte Chavasse, re Grazebrook* (1865), 34 L.J.N.S (Bkcy.) 17, at p. 18.

Commercial  
blockade.

The varieties of blockade have led to much confusion. It has been seen<sup>1</sup> that a pacific or commercial blockade<sup>2</sup> is a pre-belligerent act conventionally held to fall short of war, and justifying (according to the better view) no constraint except towards the power blockaded. It will be seen that a blockade proper is the blocking of a hostile harbour or seaboard by ships, *as a step in military operations* in order to prevent ingress or egress. If such a blockade is ineffective, it is known as a 'paper blockade.' It was commonly held that the very grave interference with neutral trade involved in a blockade could only be justified by the coincidence of military operations, of which it formed a proximate part. The peculiarity of a commercial blockade lies in the fact that it assumes to dislocate neutral trade without the plea of imminent belligerent necessity, and indeed *without being necessarily associated with military operations at all*. According to the view which has prevailed, the sole condition of the validity of a commercial blockade consists in the power of the blockading squadron to make it effective. If, as is probably the case, this practice is to be treated as established, it will no longer be possible to repeat the proposition that the neutral right to trade remains unaffected by war, except in so far as the trade is obstructive to belligerent operations. Mr. Hall's illustration is a very forcible one:<sup>3</sup> 'According to existing usage it would be legitimate, in a war between England and the United States, for the former power to blockade the whole Californian coast while the only military operations were being conducted on the Atlantic seaboard and along the frontiers of Canada.'

The theoretic objection to such blockades was well stated in a circular<sup>4</sup> sent by Mr. Cass to the American representatives in Europe: 'The investment of a place by sea and land, with a view to its reduction, preventing it from receiving supplies of men and materials necessary for its defence, is a legitimate mode of prosecuting hostilities, which cannot be objected to so long as war is recognised as an arbiter of national disputes. But the blockade of a coast, or of commercial positions along it, *without any regard to ulterior military operations*, and with the real design of carrying on a war against trade, and from its very nature against the trade of peaceful and friendly powers,

<sup>1</sup> See *supra*, p. 179.

<sup>2</sup> For a summary of instances of this practice, see Wheaton (ed. Phillipson), pp. 408, 409; and on the subject generally, see Westlake, *Collected Papers* (1914), pp. 572 *seq.*; A. E. Hogan, *Pacific Blockade* (Oxford, 1908).

<sup>3</sup> 7th ed. p. 677.

<sup>4</sup> Quoted Cobden, *Speeches*, vol. ii, p. 288.



instead of a war against armed men, is a proceeding which it is difficult to reconcile with reason or the opinions of modern times. To watch every creek and river and harbour upon an ocean frontier in order to seize and confiscate every vessel with its cargo attempting to enter or go out, without any direct effect upon the true objects of war, is a mode of conducting hostilities which would find few advocates if now first presented for consideration.'

The modern view as to the conditions necessary for establishing a pacific blockade is expressed in the rules adopted in 1887 by the Institute of International Law: <sup>1</sup>

- (1) Ships under a foreign flag may freely enter the blockaded port.
- (2) The blockade must be officially declared and notified.
- (3) It must be maintained by a sufficient force.
- (4) The ships of the blockaded state that do not respect the blockade may be sequestered, and when the blockade is raised they and their cargoes must be restored to the owners, but without any liability to pay indemnity.

The right of neutrals to carry on all legitimately acquired trade was seriously threatened by what is known as the rule of war of 1756, a rule which, though it first came into prominence in that year, was supported by precedents of an earlier date.<sup>2</sup> In the eighteenth century European countries, by legislation upon the lines of the English navigation laws, were in the habit of restricting the commerce of their colonies to vessels of their own country. During the war against this country in 1756 the French became disabled, through their relative weakness upon the sea, from carrying on trade with their colonies. They then handed over the trade between the mother-country and her dependencies to Dutch vessels, but continued to exclude other neutral traders. The English prize courts thereupon condemned all Dutch vessels captured in the course of such traffic, on the ground that vessels so engaged had in fact passed into the merchant service of France.<sup>3</sup> The rule was extended in 1793 so as to prohibit all neutral trade with the colonies and coast towns of the enemy which had not been open before the war. The principle upon which the

<sup>1</sup> *Annuaire de l'Institut de droit international*, vol. ix (1887), p. 300.

<sup>2</sup> Kent, *Commentaries on International Law* (ed. by Abdy), 2nd ed. p. 205.

<sup>3</sup> Cf. *Berens v. Rucker* (1758), 1 W. Bl. 313; *Brymer v. Atkins* (1789), 1 H. Bl. 165.

English decision proceeded was stated as follows by Lord Stowell in *The Immanuel*:<sup>1</sup> 'Upon the interruption of a war, what are the rights of belligerents and neutrals respectively regarding [colonies]? It is an indubitable right of the belligerent to possess himself of such places, as of any other possession of his enemy. This is his common right, but he has the certain means of carrying such a right into effect, if he has a decided superiority at sea: such colonies are dependent for their existence, as colonies, on foreign supplies; if they cannot be supplied and defended, they must fall to the belligerent of course—and if the belligerent chooses to direct his means to such an object, what right has a third party, perfectly neutral, to step in and prevent the execution? No existing interest of his is affected by it: he can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent, and to say, "True it is you have, by force of arms, forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest, and by sharing its benefits prevent its progress."'<sup>2</sup>

On behalf of the United States, Mr. Monroe, in a letter to Lord Mulgrave of September 23, 1805, insisted that neutrals were entitled to trade, with the exception of blockades and contraband, to and between all ports of the enemy, and in all articles, although the trade should not have been opened to them in time of peace. This view has upon the whole prevailed among American statesmen and jurists, though Chancellor Kent has intimated a different opinion.<sup>3</sup>

Various  
cases.

The question is not free from difficulty, and the answer depends upon the familiar compromise between neutral and belligerent rights. Phillimore<sup>4</sup> usefully distinguishes the following cases:—

- (1) The carrying on by the neutral of the trade between the belligerent mother-country and the colonies.
- (2) The carrying on the coasting trade of the belligerent—such trade being confined in time of peace to the belligerent subjects.
- (3) The carrying on the trade by a neutral from a port in his own country to a port of the colony of the belligerent.

<sup>1</sup> (1799), 2 C. Rob. at p. 199.

<sup>2</sup> Cf. also *The Princessa* (1799), 2 C. Rob. 52; *The Jonge Thomas* (1801), 3 C. Rob. 233*n.*; *The Anna Catharina* (1802), 4 C. Rob. 118; *The Rendsborg* (1802), 4 C. Rob. 121; *The Montara* (1906), 2 R. & J. P. Cas. 403.

<sup>3</sup> Kent, *Commentaries*, vol. i, pp. 90-92.

<sup>4</sup> *International Law*, vol. iii, p. 299.

- (4) The carrying on by a neutral of a trade between the ports of the belligerent, but with a cargo from the neutral's own country.

In the first two cases the view seems reasonable that a neutral accepting a licence to trade in effect incorporates himself in the enemy fleet, and may fairly be treated as belligerent. As Mr. Justice Story expressed it: 'The property is considered *pro hac vice* as enemy's property, as so completely identified with his interests as to acquire a hostile character.' English lawyers will find little to criticise in the conclusion of the same high American authority on the general question. 'The British,' he continues, 'have extended the doctrine to all intercourse with the colony, even from or to a neutral country, and herein it seems to me they have abused the rule. This, at present, appears to me to be the proper limits of the rule, as to the colonial trade [with the mother-country] and the coasting trade; and the rule of 1756 (as it was at that time applied) seems to me well founded; but its late extension is reprehensible.' In fact, the extension with which Mr. Justice Story quarrels can only be defended on the assumption that the rights of neutrals are confined to trade which they possessed before the outbreak of war—an assumption quite impossible to reconcile with many facts which are not in question.<sup>1</sup>

The British application of the rule in 1793 was rendered still more severe by what was known as the doctrine of continuous voyage. Orders in Council had so far relaxed as to allow the importation of the produce of the enemy's colonies into a neutral country, and its exportation thence in a neutral bottom. This led to colourable evasions by neutral shippers, and the question was much discussed by what evidence the *bona fides* of a transhipment was to be established. Lord Stowell held that the landing of the goods and the payment of duties in a neutral harbour was evidence enough of a *bona fide* importation: 'If these criteria are not to be resorted to, I should be at a loss to know what should be the test; and I am strongly disposed to hold that it would be sufficient that the goods should be landed and the duties paid.'<sup>2</sup>

The real issue in such cases was well shown in a short conversation between the Court and counsel in *The Polly*:<sup>3</sup> 'Is it contended,' said the Court, 'that an American might

<sup>1</sup> The extension of the rule in 1793 is condemned by Westlake, Part II, p. 295, and by Hall, 7th ed. p. 682.

<sup>2</sup> *The Polly* (1800), 2 C. Rob. at p. 369.

<sup>3</sup> At p. 365.



not purchase articles of this nature [in Spain] and import them, *bona fide*, to America on his own account, and afterwards export them?' It was answered, No; that was not contended; but that the truth and reality of the importation for his own account was the point in question; that all the circumstances in the case pointed to a near connection with Spanish interests; and that no proof was brought of the payment of the duties in America, nor that the transaction was in any way conducted like a *bona fide* importation for the American market.

In the later case of *The William*,<sup>1</sup> the test was stated by the Court of Appeal to be more general. 'Let it be supposed,' the judgment ran,<sup>2</sup> 'that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore lands the cargo purely and solely for the purpose of enabling himself to affirm that it was at such other place that the goods were taken on board, would this contrivance at all alter the truth of the fact? . . . If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have been ended. That these acts have been attended with trouble and expense cannot alter their quality or effect. The trouble and expense may weigh as circumstances of evidence to show the purpose for which the acts were done; but if the evasive purpose be admitted or proved, we can never be bound to accept, as a substitute for the observance of the law, the means, however operose, which have been employed to cover a breach of it.'

The rule of war of 1756 will arise less frequently now that the colonial system of Europe has chosen the better part of unrestricted intercourse, but it would be very premature to suppose that it has disappeared from the existing rules of international law. Great Britain has from time to time refrained from enforcing it: the Manual of Naval Prize Law of 1888 stated that its general application was suspended, and that it would be applied only when special instructions were issued to that effect.<sup>3</sup> The doctrine of continuous voyage became very prominent in the discussions at the Conference of London in 1908 and 1909, and the compromise on the subject which was then arrived at will be found fully set out later in the chapter on Contraband of War; but on the particular topic under consideration no agreement was reached, so that the question must be regarded as being an open one.<sup>4</sup>

<sup>1</sup> (1806), 5 C. Rob. p. 385.

<sup>2</sup> At p. 395.

<sup>3</sup> Art. 141.

<sup>4</sup> Cf. *Parl. Papers, Misc. No. 4* (1909), p. 100; and *Misc. No. 5* (1909), p. 247.

### CHAPTER III

#### THE PROPOSED INTERNATIONAL PRIZE COURT AND THE DECLARATION OF LONDON

THE Second Peace Conference at the Hague in 1907 was marked by a new departure of the highest importance in the history of naval prize law. Hitherto, as we have seen, the only tribunal competent to pronounce a decision upon any question arising out of a capture in naval warfare has been a tribunal of the belligerent captor established in his territory and presided over by his judges: the sacred character of the right of sovereignty being held to override any inconvenience which might arise from the fact that the captor was a judge in his own cause, and there being no alternative tribunal which had a better claim to exercise jurisdiction. The belligerent, in fact, was merely given an opportunity of applying a more judicial mind to the hasty acts of his naval officers.

The proposed  
International Prize  
Court.

At the Second Peace Conference<sup>1</sup> an attempt was made to remedy this state of affairs by the establishment of an International Court of Appeal, to which neutrals and, in certain cases, belligerents might have recourse when dissatisfied with the decisions of the prize courts of the captor. The original jurisdiction of the national courts was of course preserved,<sup>2</sup> and also, where so provided by the municipal law, the jurisdiction of one, but not more than one, national court of appeal:<sup>3</sup> provided that the national court or courts delivered final judgment within two years from the date of the capture.<sup>4</sup>

But after judgment by the national court of first instance or of appeal, or in default of final judgment within two years, it was provided that the case might be brought before an International Court—

Jurisdiction.

‘(1) When the judgment of the national prize courts affects the property of a neutral power or individual; (2) when the judgment affects enemy property and relates to (a) cargo on board a neutral ship; (b) an enemy ship captured in the territorial waters of a neutral power, when that power has not

<sup>1</sup> *Parl. Papers, Misc. No. 6* (1908), Cd. 4175, p. 101.

<sup>2</sup> Convention XII of 1907, Art. 2; Cd. 4175, p. 101.

<sup>3</sup> *Ibid.* Art. 6.

<sup>4</sup> *Ibid.* Art. 6.

made the capture the subject of a diplomatic claim; (c) a claim based upon the allegation that the seizure has been effected in violation, either of a conventional stipulation in force between the belligerent powers, or of an enactment issued by the belligerent captor.' <sup>1</sup>

Who may  
appeal.

The neutral power may appeal where neutral property or violation of neutral territory is concerned, the neutral individual (unless forbidden by his Government) where his own property is concerned, and the enemy subject where his own property is concerned, except in the case of alleged violation of neutral territory. <sup>2</sup>

What law  
to be applied

Where the question to be decided is covered by a treaty, the Court is directed to have regard to such treaty; and in other cases 'the Court shall apply the rules of international law. If no generally recognised rule exists, the Court shall give judgment in accordance with the general principles of justice and equity.' A failure to comply with the procedure prescribed by the belligerent captor may be disregarded if the Court is of opinion that its consequences are unjust and inequitable. <sup>3</sup>

Remedy.

The International Court was to be given power to order restitution, and to assess damages and compensation; and it was provided that there should be an appeal to it only as to damages in cases where the national court had declared the capture invalid. <sup>4</sup>

Constitution  
of the Court.

The Court was to consist of fifteen judges (nine constituting a quorum) and deputy judges, appointed for six years by the contracting powers, and eligible for reappointment: <sup>5</sup> the judges appointed by Germany, the United States, Austria-Hungary, France, Great Britain, Italy, Japan and Russia to be always summoned, and the judges and deputy judges appointed by the other powers, who were numerous, to be summoned by rota, <sup>6</sup> with a right in any belligerent to be represented in all cases in which his interests are concerned. <sup>7</sup>

Procedure.

Detailed provision was made as to procedure, <sup>8</sup> place of sitting, staff and the like; and each party was to pay its own costs, while the losing party was to pay in addition the costs of the trial and one per cent. of the value of the subject-matter of the case as a contribution to the general expenses of the Court, the amount to be fixed in the judgment of the Court. <sup>9</sup> An individual appealing was to give security for the sums he might be liable to pay. <sup>10</sup>

<sup>1</sup> Art. 3.

<sup>2</sup> Art. 4.

<sup>3</sup> Art. 7.

<sup>4</sup> Art. 8.

<sup>5</sup> Arts. 10, 11, 12.

<sup>8</sup> Art. 15.

<sup>7</sup> Art. 16.

<sup>6</sup> Arts. 19 to 45.

<sup>9</sup> Art. 46.

<sup>10</sup> Art. 46.



Finally it was agreed that the Convention should only Applicability apply as of right where the belligerent powers were all parties to it, that only a contracting power or a subject of a contracting power should have the right to appeal,<sup>1</sup> and that the deposit of ratifications should take place so soon as the powers ready to ratify furnished the necessary quorum of nine judges and nine deputy judges,<sup>2</sup> with leave to other powers to accede subsequently to the Convention. The Convention was to come into force six months from such deposit of ratifications;<sup>3</sup> and was to continue in force for twelve years, with a tacit prolongation for six years if not denounced, denunciation being only operative in respect of the denouncing power.<sup>4</sup>

Certain difficulties have stood in the way of the prompt Difficulties. ratification of this Convention. In Great Britain, parliamentary sanction is necessary, as it involves a limitation upon the jurisdiction of the courts and the absolute sovereignty of the Crown. This sanction would have been granted if the Naval Prize Bill of 1910 had become law. In the United States, the difficulty is more serious, as the written constitution of that country precludes any right of appeal from the Supreme Court. The United States delegates, at the Conference of London to which we will shortly refer, invited the delegates to accept the principle 'that as regards countries where such constitutional difficulties arose, all proceedings in the International Prize Court should be treated as a rehearing of the case *de novo* in the form of an action for compensation, whereby the validity of the judgments of the national courts would remain unaffected, whilst the duty of carrying out a decision of the International Court ordering payment of compensation, would fall upon the Government concerned.' On such a question the Conference of London had no authority; but to facilitate the adhesion of the United States to the Prize Court Convention, the delegates expressed a wish (*væu*), by which they agreed to call the attention of their Governments to the advantage of giving power to states so situated to deposit their ratifications with a reservation 'to the effect that resort to the International Prize Court, in respect of the decisions of their National Tribunals, shall take the form of a direct claim for compensation, provided always that the effect of this reservation shall not be such as to impair the rights secured under the said Convention, either to individuals or to their Governments, and that the terms of the reservation shall form the subject of a subsequent understanding between the powers

<sup>1</sup> Art. 51.<sup>2</sup> Art. 52.<sup>3</sup> Art. 54.<sup>4</sup> Art. 55.

signatory of that Convention.' No such understanding has as yet been reached.

But apart from these questions of constitutional difficulty, the general acceptance of the Convention was delayed by the provision already referred to, that the International Prize Court was to apply the rules of international law, and if no generally recognised rule existed, should give judgment in accordance with the general principles of justice and equity.<sup>1</sup>

At the Conference at the Hague in 1907, a certain measure of agreement was arrived at on some questions relative to maritime war, but a large number of important questions were either not discussed, or, if discussed, revealed great divergencies of opinion. Several powers intimated that unless such uncertainty could be removed, they would be unable to ratify the Convention, and in these circumstances a Conference of the chief maritime powers (to whom was added the Netherlands) met in London in 1908, at the invitation of Great Britain, with the object of arriving, if possible, at an understanding as to the rules of international law applicable to all subjects which would come before the International Prize Court. This Conference was a more practical body than those assembled at the Hague, as its members were restricted to the powers whose interests were mainly affected, and its procedure was organised on more business-like lines. The powers represented drew up preliminary memoranda, intended to set out their views of the existing law; from these memoranda the principles on which there seemed to be some approach to a general agreement were extracted so far as possible, and set out as 'bases of discussion'; and, as the result of prolonged discussion, a code of rules was drawn up of a more complete and elaborate character than anything hitherto attempted in the region of international law. This is embodied in the Declaration of London, the Articles of which are set out in the following chapters. These Articles are for the greater part an exposition of existing law, though to some extent they constitute a declaration of new law. As they were the result in many cases of a compromise, concessions by one nation being conditional on concessions made by others, it was agreed <sup>2</sup> that they must be ratified, if at all, as a whole.

It will be seen that, though elaborate, they are not by any means an entirely complete code of naval prize law, and in their interpretation difficulties would sometimes arise as to whether particular rules were exclusive of, or might be supple-

The Conference of London.

The Declaration of London.

<sup>1</sup> See p. 328, *supra*.

<sup>2</sup> Art. 65.

mented by, national case law; but they mark a very important advance towards the establishment of a written code of international law. They have not, however, been ratified by the powers concerned, and there are constitutional difficulties, as we have seen, in the way of their ratification by the United States; but even if they were never ratified, it was thought that the fact that they were the considered conclusions of a chosen body of the jurists, statesmen and sailors of the chief maritime countries of the world, would give them an authority which could not in the future be without influence upon the decisions of any international court or arbitrator. The possibility, however, was not to be overlooked that a refusal by any power to ratify might lead to an abandonment of all concessions made, and a more determined insistence than ever by each power upon its own point of view. It is to be noted that the official commentary or report which accompanies the Articles of the Declaration was treated by continental practice as an authoritative explanation of its terms, and consequently would, in all probability, be so treated by an international court.<sup>1</sup>

During the Great War, the Declaration of London was subjected to numerous modifications at the hands of the belligerents; so that henceforth it cannot—as an integral instrument or as a unified code—be regarded as possessing international authority, much less binding force. When such modifications were not expressly specified, the provisions of the Declaration were in some cases presumed to have been accepted and intended to be applied; in other cases, a contrary view was adopted, as, for example, by the British Prize Courts.<sup>2</sup> In the course of the present work its provisions have been set out to show their relation to pre-existing law and practice.

<sup>1</sup> See *Parl. Papers, Misc. No. 4* (1909), p. 94. There is some controversy on this point, but the statement in the text appears to be correct. It is the view taken by the British delegates, and is supported by the words of the Report itself. Moreover an Order in Council of August 20, 1914, provided as follows: 'The General Report of the Drafting Committee on the said Declaration . . . shall be considered by all Prize Courts as an authoritative statement of the meaning and intention of the said Declaration, and such Courts shall construe and interpret the provisions of the said Declaration by the light of the commentary given therein' (*Manual of Emergency Legislation* (1914), pp. 144, 145). This provision was accordingly acted upon by the Prize Court, in *The Sorfareven* (1915), 1 P.C. 589, at p. 602. An Order in Council of October 29, 1914, however, repealed the provision of the preceding Order on this point.

<sup>2</sup> Cf. *The Hakan* (1917), 2 P.C. 479; *The Louisiana* (1918), A.C. 461.



## CHAPTER IV

### THE LAW OF CONTRABAND <sup>1</sup>

Contraband trading. 'IL est considéré de l'aveu de toutes les nations de l'Europe,' says G. F. de Martens,<sup>2</sup> 'comme contraire à la neutralité de permettre à nos sujets de transporter vers les ports de l'une ou des deux puissances belligérantes de certaines marchandises qu'on désigne sous le nom de *contrebande de guerre*.'<sup>3</sup> The observation, for reasons which have been stated, requires qualification.<sup>4</sup> It is not a breach of neutrality for a neutral state to permit such traffic, but the belligerent Government is left to confront, and exact reparation from, the offending neutral individual. Nor is the act of carrying contraband in itself illegal by English law, unless prohibited by proclamation or order in council;<sup>5</sup> and those states which have in fact prohibited the export of contraband, as the Netherlands and Brazil during the Spanish-American War, and Sweden during the Russo-Japanese War, are justly regarded as having shown an excess of caution which goes beyond neutral duty.<sup>6</sup>

Definition of contraband. Contraband property was defined in the British Memorandum drawn up for the purposes of the London Conference as 'neutral property on board ship on the high seas or in the territorial waters of either belligerent which (1) is by nature capable of being used to assist in, and (2) is on its way to assist in, the naval or military operations of the enemy.'

The official Report on the Declaration of London distinguished contraband goods from non-contraband thus: 'The notion of contraband connotes two elements: it concerns objects of a certain kind and with a certain destination.

<sup>1</sup> The literature on the subject of contraband of war is now very extensive; a useful classification of authorities is to be found in H. R. Pyke, *The Law of Contraband of War* (Oxford, 1915).

<sup>2</sup> *Précis du droit des gens* (ed. by C. Vergé, Paris, 1858), liv. viii, chap. vii, § 318.

<sup>3</sup> The Papacy had in earlier ages forbidden trade with infidels in certain articles, e.g. weapons and munitions of war—'merces banno interdictæ'; trade in such forbidden articles was said to be 'contra bannum,' hence the word 'contraband.'

<sup>4</sup> See p. 320, *supra*; and cf. Ortolan, *Dip. de la mer*, ii, 199. 'Il ne s'agit pas d'actes d'un gouvernement qui romprait la neutralité, mais d'actes de particuliers qui exercent leur trafic.'

<sup>5</sup> *Ex parte Chavasse, in re Grazebrook* (1865), 34 L.J.N.S. (Bkcy.), 17. *The Helen* (1855), 1 A. & E. 1.

<sup>6</sup> Westlake, Part II, p. 299.

Cannons, for instance, are carried in a neutral vessel. Are they contraband? That depends: if they are destined for a neutral Government, no; if destined for an enemy Government, yes. The trade in certain articles is by no means generally forbidden during war; it is the trade with the enemy in these articles which is illicit, and against which the belligerent to whose detriment it is carried on may protect himself by the measures allowed by international law.' <sup>1</sup> Thus the necessary criteria are usefulness in war and enemy destination. It is more logical, however, to say that destination is not strictly an indispensable element in the definition of contraband, the essence of which is suitability for use in war; though a particular destination is a condition precedent to the exercise of the right of seizure and condemnation.

Grotius <sup>2</sup> divided all articles which may be the subject of neutral trade into three classes: Classes of  
merchandise.

1. Articles, such as arms, which are useful only for war.
2. Things which merely serve for pleasure, and have no warlike use.
3. Things *ancipitis usus*, i.e. which may be used equally for peace and war, e.g. money, provisions, ships and tackle.

It is clear, he observes, that articles falling under class (1) are contraband, and equally clear that those under (2) are innocent. It is under the third head that difficulties mainly arise. In such cases, he observes, 'Distinguendus erit belli status' (the circumstances of the war must be taken into consideration). And to the same effect writes Heineccius: <sup>3</sup> 'Sometimes things of the very smallest importance become all-important, if the enemy is distressed for the want of them, and unable to procure a supply from any other source.'

The judgment of the court in *The Peterhoff*, <sup>4</sup> an American case, restated the Grotian arrangement: 'A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes the first consists of articles manufactured, and primarily and ordinarily used, for military purposes in time

<sup>1</sup> *Parl. Papers, Misc. No. 4* (1909), pp. 33 seq.

<sup>2</sup> *Lib. iii, c. 1, § 5.*

<sup>3</sup> 'Magnum sane aliquando momentum in bellis habent res minimi momenti, si hostis laboret inopia, nec verum istarum aliunde copia sit' (*De jur. prin. civ. com.* § 12).

<sup>4</sup> (1866), 5 Wall. p. 58.

of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes. Merchandise of the first class destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege.'

A long series of treaties, declarations, proclamations and decrees<sup>1</sup> between and by the chief civilised nations of the world shows the gradual development of the practice as to contraband. There was a tendency in the earlier periods for powers to take upon themselves the liability to restrain their own subjects from the traffic in prohibited goods.<sup>2</sup> The method adopted was almost always that of close enumeration rather than general definition of contraband articles, and the lists varied according to the interests at the time of the nations concerned, each belligerent being entitled to decide for himself what articles to ban.

Absolute  
and con-  
ditional  
contraband.

The distinction between absolute contraband (*i.e.* property useful for war purposes which may be confiscated if on its way to enemy territory) and conditional contraband (*i.e.* property that may be confiscated only if destined for the armed forces of the enemy) is not at first clearly drawn, the attention of treaty-makers being concentrated upon drawing up lists of things which in no circumstances are to be supplied to enemies of the parties. It was recognised at an early period, and repeatedly laid down, that commerce with a place invested or blockaded stands on a different footing from trade in contraband; but the first instance of a distinction being suggested between destination to enemy country and destination to enemy armed forces is found in an American circular of 1777,<sup>3</sup> in which the right to seize neutral vessels is limited to those 'having on board soldiers, arms, munitions, provisions and other contraband intended for the British army and its war-ships,' though it is not clear that such a distinction was clearly contemplated in this case, as the intention would no doubt be presumed if any enemy port were the destination in the case of soldiers, arms and munitions, and the position of provisions

<sup>1</sup> Summarised by Atherley-Jones, *Commerce in War*, pp. 8-55.

<sup>2</sup> *e.g.* England, Spain and Burgundy in 1604, England and the Low Countries in 1625, England and Denmark in 1670.

<sup>3</sup> Atherley-Jones, p. 23.



was doubtful, they having frequently been included in lists of absolute contraband.<sup>1</sup>

There is a recognition of a similar distinction in a treaty of 1806,<sup>2</sup> between Great Britain and the United States, when tar and pitch were declared not contraband, unless going to a port of naval equipment, in which case they were to be not confiscated but subject to a right of pre-emption.

Distinctions  
made by  
various  
states.

The distinction occurs again in a decree issued by the Peruvian Government in 1866,<sup>3</sup> by which coal was declared contraband if destined for the use of Spanish ships of war, and in a treaty made between the Argentine Republic and Peru in 1874, which specified as contraband 'victuals destined for hostile troops or fleets.'

In the war between Russia and Turkey in 1877, Russia included in her list of contraband 'tous les objets destinés aux troupes de terre ou de mer.' If 'destinés' meant 'destined for' and not 'adapted for,' this was a complete change of front on the part of that country, which had hitherto pursued the policy of restricting contraband to munitions of war, and a striking illustration of the effect produced upon a nation which having been neutral finds itself a belligerent.<sup>4</sup> Even apart from this the list contained a number of articles classed as absolute contraband (such as spades), which went far beyond anything previously contemplated, and violated the principle that absolute contraband must be articles having only a war-like use.

France, when at war with China in 1885, found herself unable to resist a similar temptation. Her treaties up to the year 1856 had given evidence of a firm determination to restrict contraband to munitions of war, and to keep provisions on the free list; but in this year the French Government declared rice contraband if destined to Chinese ports. The British Government protested on the ground that though provisions might be contraband if consigned to a fleet, or to a port where a fleet might be lying, they were not absolute contraband; and the French Government defended its attitude by claiming that it is for the belligerent to decide the question of what is contraband, and by laying stress upon the importance of rice, not only to Chinese armies but to the Chinese population.<sup>5</sup>

<sup>1</sup> Great Britain, in 1776, declared all ships trading to the American colonies lawful prize (Atherley-Jones, *ibid.* p. 24).

<sup>2</sup> *Ibid.* p. 32.

<sup>3</sup> *Ibid.* p. 42.

<sup>4</sup> *Ibid.* p. 44.

<sup>5</sup> *Ibid.* p. 45. *Parl. Papers, Misc.* No. 2, 1911, where the whole correspondence is set out. France quoted a statement by the Attorney-General in

In the British Manual of Naval Prize Law of 1888, the distinction was fully elaborated, naval stores being included in the list of absolute, and provisions, money, coals and horses in the list of conditional, contraband.

Spain, which had in 1866 declared coal contraband when it found it convenient to do so (with a proviso that the declaration was not to be taken for a precedent), claimed in 1898 the right of determining anything to be contraband. Russia, in 1900, included 'in general, all other articles directly intended for war on land or sea, if they are being conveyed on behalf of, or are destined for, the enemy,' adding the explanation,<sup>1</sup> that 'by the expression "destined for the enemy," is understood conveying to his fleet, to one of his ports, or even to a neutral port, if the latter is shown by clear and indisputable evidence to be simply an intermediate station on the way to the enemy, the latter being really the ultimate destination.'

By the Japanese notification of 1904, during the war with Russia, two lists were set out: the first of goods intended solely for use in war and to be 'regarded as contraband when passing through or destined for enemy's use'; the second, which included food, drink, horses, coal, gold and silver, and telegraph, telephone and railway materials, to be 'regarded as contraband of war when destined for enemy's army or navy, or in such cases where, being goods arriving at enemy's territory, there is reason to believe they are intended for use of enemy's army or navy.'

The Russian Government in the same war spread the net very wide indeed.<sup>2</sup> Their list of contraband included such articles *ancipitis usus* as barbed wire, harness, pots and pans,

1854 that one of the categories of contraband is 'articles which may be of indirect use in war, by permitting a continuation of hostilities, such as provisions'; an official letter of Lord Malmesbury in 1859 warning British subjects 'that if they convey for the use of either belligerent articles which are held to be contraband of war, and if their property be seized by either belligerent, Her Majesty's Government will not take upon itself to intervene on their behalf . . . the prize court of the country which has made the seizure is competent to decide the case'; and a passage from a letter of 'Historicus' (officially approved by the Attorney-General in 1870): 'It is not for a neutral state to define what is or what is not contraband of war. It appertains alone to the prize court of the belligerent which has effected the capture to take cognizance of that question.' The British reply admitted that it was for the belligerent prize court to decide the legality of seizures, but subject to ulterior diplomatic action if the Court did not act in accordance with the principles of international law, and the protest against the treatment of rice as contraband was maintained. But the war ended shortly afterwards and the dispute went no further; large shipments of rice having been in the meanwhile stopped through fear of capture.

<sup>1</sup> Atherley-Jones, *ibid.* p. 47.

<sup>2</sup> *Ibid.* pp. 47, 48.

coal, naphtha, alcohol and every kind of fuel, telegraph, telephone and railroad materials, and 'generally everything intended for warfare by sea or land, as well as rice, provisions and horses, beasts of burthen and others which may be used for a warlike purpose, if they are transported on behalf of, or are destined for, the enemy' ('pour le compte ou à destination de l'ennemi'). In addition, instructions to Russian commanders included 'all kinds of grain, fish, fish products, beans, bean oil and oil-cakes,' and also, specifically, cotton.

The words used were, it is to be noted, 'pour le compte ou à destination de l'ennemi'; which, if 'l'ennemi' were strictly construed as meaning any enemy subject, would have in effect put everything into the list of absolute contraband. But in the cases of *The Arabia*<sup>1</sup> and *The Calchas*,<sup>2</sup> the Supreme Prize Court at St. Petersburg laid it down that 'the articles enumerated in clause 10 of the said Article of the Imperial Order of February 14, 1904, are deemed to be contraband of war only if carried on account of, or destined for, the enemy, i.e. when carried to the enemy Government, contractors, army, navy, fortresses or naval harbours, and not if carried for private individuals, subjects of the enemy country, and more especially neutral Governments or private individuals.'

This interpretation of the word 'enemy' in this connection is in accordance with the British rule as to conditional contraband; and it is important, in view of certain doubts which have been expressed on a clause of the Declaration of London, which is dealt with later.

Thus the distinction between absolute and conditional contraband was very late in making its appearance in state documents; and in 1674, Sir Leoline Jenkins, in a case where Spain had seized British pitch and tar, declared it his opinion<sup>3</sup> 'that nothing ought to be judged contraband . . . but what is directly and immediately subservient to the use of war, except it be in the case of besieged places or of a general certification by Spain to all the world that they will condemn all the pitch and tar they meet with.'

But the British prize courts have, from the latter part of the eighteenth century and particularly since the case of *The Jonge Margaretha*,<sup>4</sup> consistently laid stress upon the distinction. In that case Sir W. Scott said: 'But the most important distinction is whether the articles were intended for the ordinary

Decisions of  
prize  
courts.

<sup>1</sup> (1904), 1 R. & J. Pr. Cas. 42.

<sup>2</sup> (1904), 1 R. & J. Pr. Cas. 118, at p. 143.

<sup>3</sup> Wynne, *Life of Sir Leoline Jenkins*, vol. ii, p. 751.

<sup>4</sup> (1798), 1 C. Rob. 188.



uses of life, or even for mercantile ships' use, or whether they were going with a highly probable destination to military use. Of the matter of fact on which the distinction is to be applied, the nature and quality of the port to which the articles were going is not an irrational test. If the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. On the contrary, if the great predominant character of a port be that of a port of naval or military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place.' <sup>1</sup>

The British rule was followed by the American Courts; <sup>2</sup> and the Russian Court, as we have seen, recognised the distinction in the case of *The Calchas* <sup>3</sup> and *The Arabia*.<sup>4</sup> In the Great War, however, it practically disappeared; e.g. conditional contraband was proved either to be subject to state control in Germany, or bound for a port of 'naval or military equipment,' all German ports being of this character.

Treatment of  
various  
articles.

With regard to the question what articles are contraband, the practice has been conflicting and varied. We may, with Ortolan,<sup>5</sup> put arms and munitions of war on one side as being always and at all times contraband.

Horses have been specifically included in the list in treaties on a large number of occasions, being accounted absolute contraband, though clearly *ancipitis usus*; money has been more leniently dealt with, and on several occasions expressly excluded; ships have been occasionally included, though usually not mentioned; naval stores have been frequently excluded, though more often included, and, on two occasions, included

<sup>1</sup> See also the following cases: *The Endraught* (1798), 1 C. Rob. 21; *The Haabet* (1800), 2 C. Rob. at p. 182; *The Neptunus* (1800), 3 C. Rob. 108; *The Edward* (1801), 4 C. Rob. 68; *The Nostra Signora di Begona* (1804), 5 C. Rob. 97; *The Charlotte* (1804), 5 C. Rob. 305; *The Zelden Rust* (1805), 6 C. Rob. 93. At one time there was a tendency to regard as excepted from the list of contraband articles which were the native produce of the country from which they came, or at the least to treat them as subject not to confiscation but to pre-emption, but this rule has for all practical purposes disappeared. See *The Staadt Embden* (1798), 1 C. Rob. 26; *The Jonge Margaretha* (1798), 1 C. Rob. 188; *The Apollo* (1802), 4 C. Rob. 158; *The Jonge Pieter* (1801), 4 C. Rob. 83. See also *The Hakan* (1917), 2 P.C. 479 (The Privy Council affirming the decision of the Prize Court (1916), 2 P.C. 210); *The Kim* (1915), 1 P.C. 405.

<sup>2</sup> *The Commercen* (1816), 1 Wheat. 382; *Maisonnaire v. Keating* (1815), 2 Gall. 325; *The Peterhoff* (1866), 5 Wall. 28; *United States v. Diekelman* (1875), 92 U.S. Rep. 520; *The Benito Estenger* (1900), 176 U.S. Rep. 568; *The Juno* (1903), 38 Ct. Cl. (U.S.), 465; *The Bird* (1903), 38 Ct. Cl. (U.S.), 228.

<sup>3</sup> (1904), 1 R. & J. Pr. Cas. 118.

<sup>4</sup> (1904), 1 R. & J. Pr. Cas. 42. See p. 337, *supra*.

<sup>5</sup> *Dép. de la mer*, vol. ii, p. 190.

as conditional contraband; and provisions, though included in some of the seventeenth-century treaties, and in an American Declaration of 1861, were repeatedly excluded in express terms, but treated by France in 1885 as absolute contraband.

National practice has varied often according to the exigencies of the moment. England, in the seventeenth century, declined on general principles to recognise pitch or tar as contraband, while claiming for a belligerent the right to draw up a list at the beginning of a war according to circumstances; but at the end of the eighteenth century, being a belligerent, put naval stores such as tar, pitch, hemp and masts in the list of absolute contraband.<sup>1</sup> Horses she was treating as absolute contraband in treaties from 1656 to 1810, but in the Admiralty Manual of 1888 they appear as conditional only, along with money, telegraph and railway material and coals; and provisions, treated as absolute contraband in 1654 (in a treaty with Holland) and 1793, and thereafter on many occasions expressly declared to be free, have been dealt with as on principle included in the conditional list, in accordance with the judgment in *The Jonge Margaretha*.<sup>2</sup> In that case, cheeses sent by a Papenberg merchant from Amsterdam to Brest, where a considerable French fleet was stationed, were condemned by Sir W. Scott, who observed: 'I take the modern established rule to be this, that generally provisions are not contraband, but may become so under circumstances arising out of the peculiar situation of the war, or the condition of the parties engaged in it.'

Practice of  
states:  
Great  
Britain.

British authorities, as has been seen, could be readily multiplied. In *The Ranger*,<sup>3</sup> a cargo of biscuit and flour had been put on board an American ship from the public stores at Bordeaux, and was bound for Cadiz, though ostensibly documented for Villa Real in Portugal. Sir W. Scott condemned the vessel, and his judgment is noticeable as suggesting that a claim might legally be made to condemn all provisions, whether intended for military consumption or not: 'This is a very gross attempt to abuse the instructions which were issued for the supply of provisions to Spain. It must always be remembered that this Government might have availed itself of the interior distress of the enemy's country as an instrument of war; it did not, however, but humanely permitted cargoes of grain to be carried, without molestation, for the relief of the necessities of famine under which Spain had for some time

<sup>1</sup> *The Maria* (1799), 1 C. Rob. at p. 371a; *The Charlotte* (1804), 5 C. Rob. 305; Admiralty Manual, 1888,

<sup>2</sup> (1798), 1 C. Rob. 189.

<sup>3</sup> (1805), 6 C. Rob. 125.

laboured. It was natural to expect that a grant made with so much liberality would have been used with the most delicate honour and good faith both by Spain and her allies.'

Acting on this view of her rights, England had seized, in 1793, all vessels bearing provisions which were destined for French ports; and a similar claim was made by France with regard to rice in the war with China in 1885. But such claims are not consistent with the admitted rights of neutrals. The interference with neutral trade is limited by belligerent necessity, and to impose the pressure of starvation upon a non-combatant population is not, according to modern ideas, a permissible operation of war, unless—as will be seen later—the Government of the enemy country assumes control over the general supplies, for the purpose of allocating them primarily to the combatant sections of the population.

United  
States.

The United States, in her treaties, has been fairly consistent in regarding horses as absolute contraband, but less consistent in her treatment of naval stores, which have been more often excluded than included, though it has been frequently conceded that these and shipbuilding materials are contraband.<sup>1</sup>

With regard to provisions, the United States joined the armed neutrality of 1780, which limited contraband strictly to munitions of war; but this was hardly an expression of the country's policy, for it was laid down in various cases<sup>2</sup> that provisions are conditional contraband, in spite of treaties which dealt with them as entirely free. In her war with Spain in 1898, the United States made provisions conditional contraband.

France.

French treaties till the nineteenth century steadily included horses as absolute contraband, and then ceased to mention them; occasionally included naval stores, but more usually excepted them or left them unmentioned, and practically always put provisions on the free list. By French practice, ship timber and naval stores were not contraband,<sup>3</sup> and a similar principle was adopted in 1859 and 1870 in regard to coal, which England in 1870 regarded as in the conditional list and Germany claimed to be absolute contraband. No belief in consistency, however, prevented France in 1885 from claiming to treat rice as absolute contraband, as already mentioned.

<sup>1</sup> Woolsey, *International Law*, 5th ed. p. 332; Hall, 7th ed. p. 696.

<sup>2</sup> *Maisonnaire v. Keating* (1815), 11 Gall. 335; *The Commercen* (1816), 1 Wheaton, 387; *The Benito Estenger* (1900), 176 U.S. Rep. at p. 573.

<sup>3</sup> *Il Volante* (1807), 1 Pistoye et Duverdy, 409; *La Minerve* (1801), *ibid.* 410.



Prussia was one of the parties who joined the Armed Neutrality of 1780, and was at that time anxious for the strictest limitation of belligerent rights; but, as we have seen, her view had entirely changed in 1870 with regard to coal, and a prominent German jurist, Heineccius, in 1721,<sup>1</sup> regarded naval stores and provisions of every kind as absolute contraband.

Russia, throughout her history, has consistently claimed that horses are always free, and her tendency was always towards a strict limitation of the list of contraband. She was the leading spirit in the Armed Neutralities; and she protested firmly in 1884 against the inclusion of coal. Nevertheless, in her war with Japan in 1904, in her list of contraband (no distinction being expressly made between absolute and conditional) were found coal, telegraph, telephone and railway materials, and 'all objects intended for war by sea or land, including rice, provisions and horses,' and in that war she claimed to include raw cotton,<sup>2</sup> and declared provisions absolute contraband, till induced, by a protest from Great Britain, to place them in the conditional list. As we have seen, however, the distinction between absolute and conditional contraband was, in fact, recognised by the Russian Courts. Nor was Russia's attitude at the Conference of London at all in accord with her traditional anxiety to guard the rights of neutrals, for she proposed to include in the list of absolute contraband many articles which should be and were ultimately placed only on the conditional list.

In the case of *The Allanton* in 1904,<sup>3</sup> the Russian Prize Court condemned a British vessel proceeding with Japanese coal from Japan to British consignees in Singapore, the grounds of condemnation being irregularities in the papers, evidence of the previous conveyance of contraband to Japan, and 'the chartering of the steamer for her last voyage by a Japanese trading company, and the fact that she was carrying a full cargo of coal, which would have been contraband of war if the real destination of the steamer had been a hostile port or squadron, and not Singapore.' This decision, indefensible on any ground, was reversed by the Supreme Court at St. Petersburg, for the very proper reasons that there was nothing to prove that the cargo was intended for conveyance to an enemy port, and that neutral vessels cannot be confiscated merely because they have on a previous occasion carried

<sup>1</sup> *De navibus ob vecturam vetitarum mercium commissis* (1721), xiv.

<sup>2</sup> See p. 337, *supra*.

<sup>3</sup> 1 R. & J. Pr. Cas. 1, at p. 4.

contraband to the enemy; but it was held, on grounds of doubtful validity, that there had been sufficient cause for suspicion to justify detention.

The Hague  
Conference.

At the Second Peace Conference at the Hague in 1907, a proposal was made tentatively by Great Britain that contraband should be entirely abolished, but the suggestion was not received with sufficient favour to lead to there being any prospect of its adoption. More consideration was given to a proposal made by the United States, that the right of seizure for all but absolute contraband should be given up;<sup>1</sup> and the British Government went into the Conference at London in 1908 prepared, if it were found practicable, to make an agreement to that effect.<sup>2</sup> Even on this, however, it was found impossible to arrive at anything approaching unanimity, and the suggestion was abandoned and attention concentrated upon an attempt to secure some reasonable degree of certainty as to what articles belonged to each class of contraband, and what were to be considered entirely free.

The Declara-  
tion of Lon-  
don.

Faced with the confusion and uncertainty prevailing on these points, a committee of the Second Peace Conference drew up provisionally a list of articles to be considered absolute contraband, and this list was adopted by the Conference of London as the best available compromise between the views of those powers who wished to enlarge it and of those who wished to limit it still further. Great Britain and Japan tried to secure the elimination from it of horses and mules; Germany and Russia desired to include railway, telegraph, telephone and aeronautical material; France, telegraph and aeronautical material; Russia, in addition to the above, provisions of a character adapted to military consumption, gold and silver and paper money of every kind.

Absolute  
contraband.

This list is set out in Art. 22 of the Declaration:

‘The following articles may, without notice (“de plein droit”), be treated as contraband of war under the name of absolute contraband:—

1. Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.
2. Projectiles, charges and cartridges of all kinds, and their distinctive component parts.
3. Powder and explosives specially prepared for use in war.

<sup>1</sup> This had been proposed in 1896 by the Institute of International Law.

<sup>2</sup> They were supported in this by Austria, Spain and the Netherlands.

4. Gun mountings, limber-boxes, limbers, military waggons, field forges, and their distinctive component parts.

5. Clothing and equipment of a distinctively military character.

6. All kinds of harness of a distinctively military character.

7. Saddle, draught and pack animals suitable for use in war.

8. Articles of camp equipment and their distinctive component parts.

9. Armour plates.

10. Warships, including boats and their distinctive component parts of such a nature that they can only be used on a vessel of war.

11. Implements and apparatus designed exclusively for the manufacture or repair of arms, or war material for use on land or sea.'

The above list was recognised as practically including everything at present known which can be described as exclusively adapted for use in war; and indeed it went further than this and included, notably in the case of horses and mules, things *ancipitis usus*. But in view of the possibility of further discoveries and inventions, several countries were anxious to retain a power of adding to the list; and the claim which, as we have seen, had been made by some belligerents, that a belligerent nation has the right to declare what it pleases to be contraband, is reflected, but with an important reservation, in Art. 23:

Power to  
add to the  
list.

' Articles (" les objets et matériaux ") exclusively used for war may be added to the list of absolute contraband by a declaration, which must be notified. Such notification must be addressed to the Governments of other powers, or to their representatives accredited to the power making the declaration. A notification made after the outbreak of hostilities is addressed only to neutral powers.'

Any article so notified would be subject, of course, to the ultimate decision of the proposed International Prize Court on the question whether it was or was not an article ' exclusively used for war.' If it was not, the notification would be invalid.<sup>1</sup>

<sup>1</sup> During the Great War experience showed that many articles *ancipitis usus*, as well as many included in the free list, were used for no other than warlike purposes, e.g. copper, with the result that the lists of absolute contraband were enormously extended. See *infra*, pp. 356n., 362.



In case absolute contraband is seized when it is on its way to the enemy, a Prize Court 'will not embark upon enquiries as to what will, or, to speak more strictly, what may, ultimately become of it. Such an enquiry would be a dangerous fetter to fasten upon belligerent captors.'<sup>1</sup>

Destination:  
continuous  
voyage.

To justify condemnation, contraband goods must have an enemy destination; that is to say, a destination to the enemy's fleet, or to some place in territory belonging to or occupied by the enemy. During the American Civil War this rule was modified by the American courts in a manner which roused the most acute controversy. Acting upon a supposed analogy to Lord Stowell's doctrine of continuous voyage, which has been considered in connection with the rule of war of 1756,<sup>2</sup> the American Supreme Court held in *The Bermuda* <sup>3</sup>:—

- (1) That voyages from neutral ports with cargo intended for belligerent ports are not protected in respect of seizure, either of ship or cargo, by an intention, real or pretended, to touch at intermediate neutral ports.
- (2) That contraband is always subject to seizure when being conveyed to a belligerent destination, whether the voyage be direct or indirect.
- (3) That ultimate destination alone justifies seizure of contraband.<sup>4</sup>

It followed from this decision that neutral traders could be arrested on mere suspicion of intention to convey contraband to the enemy. It is clear that the English doctrine of continuous voyage lent no support to such a claim. Indeed, in *The Imina* <sup>5</sup> Lord Stowell, the author of that doctrine, had explicitly held that the rule concerning contraband was that the articles must be taken in the actual prosecution of the

<sup>1</sup> *The Axel Johnson*; *The Drottning Sophia* (1917), 2 P.C. 532, at p. 540.

<sup>2</sup> See p. 323, *supra*.

<sup>3</sup> (1865), 3 Wall. 514; cf. *The Springbok* (1866), 5 Wall. 1; *The Peterhoff* (1866), 5 Wall. 28.

<sup>4</sup> Cf. *The Balto* (1917), 2 P.C. 398 (goods seized on their way to a neutral country: alleged enemy destination after manufacture).

<sup>5</sup> (1800), 3 C. Rob. 167. In *Hobbs v. Henning* (1865), 17 C.B.N.S. 791, a case arising out of the voyage of the *Peterhoff*, the Court of Common Pleas held, conformably to Stowell's view, that contraband goods belonging to a neutral are not seizable, except in the actual prosecution of a voyage to an enemy's port. But a few years later, in *Seymour v. The London and Provincial Marine Insur. Co.* (1872), 41 L.J.N.S.C.P. 192, another case arising out of the same voyage, it was held that the criterion of contraband was 'the intention that the goods should in the course of the same transaction go on to the Confederate States,' and that the profits should be obtained on delivery there.

voyage to an enemy's port. The American view, which was acted upon in the case of *The Hart*,<sup>1</sup> was made the subject of severe criticism, and Mr. Justice Nelson, himself a judge of the American Supreme Court at the time, admitted: 'The truth is, that the feeling of the country was deep and strong against England, and the judges, as individual citizens, were no exception to that feeling.'<sup>2</sup>

It is at the same time conceived that on principle the objection to the American doctrine rests in the extreme difficulty of proving to satisfaction an ultimate destination in cases where mediate calls in neutral ports are admittedly contemplated. This objection will not apply to cases where the intention to carry a cargo then on board to an enemy port is in fact established, or where it is clear that the cargo, though intended to be discharged at a neutral port, is to be conveyed thence by some other means of transport to an enemy destination. It is admitted that the evidence must be almost irresistibly strong, but assuming it to be so, it is not clear that the neutral has any ground of complaint. The case, in fact, falls within Lord Stowell's dictum in *The Imina*: 'A voyage is none the less a voyage to an enemy's port that it is broken by calls on the way.' It was on this principle that the British Government acted during the Boer War in 1899 and 1900 in the cases of the *Bundesrath*, the *Herzog* and the *General*, which were detained on the suspicion that they were carrying contraband and combatant persons who were destined for the Transvaal, though, as that country had no seaboard, their primary destination was of necessity a neutral port. There was not sufficient evidence to justify the bringing of those vessels before a court, and they were released and compensation was paid by the British Government.<sup>3</sup> Germany insisted strongly that 'according to the recognised principles of international law there cannot be contraband of war in trade between neutral ports'; and the British Government quoted Bluntschli in reply: 'Si les navires ou marchandises ne sont expédiés à destination d'un port neutre que pour mieux venir en aide à l'ennemi il y aura contrebande de guerre et la confiscation sera justifiée.'<sup>4</sup>

<sup>1</sup> (1865), 3 Wall. 559.

<sup>2</sup> Letter to Mr. Lawrence, Aug. 4, 1873, referred to by Sir Travers Twiss, in *Law Magazine and Review*, 4th ser. vol. iii, p. 31.

<sup>3</sup> Wheaton (ed. Phillipson), p. 734.

<sup>4</sup> For the correspondence between Great Britain and Germany on the subject, see *Parl. Papers, Africa*, 1900, No. 1.

Italy<sup>1</sup> in her Abyssinian campaign held and acted upon the English view; and indeed it is difficult to see by what other means the legitimate rights of a belligerent could be enforced in cases where the only approach to his enemy's country by sea is through neutral ports. The right for which Lord Salisbury in 1900 contended ought, no doubt, to be exercised in practice with extreme considerateness and care, but it is certain to be claimed by every belligerent who sees that munitions of war are reaching his opponent through neutral channels.

Rule of the  
Declaration  
of London.

At the Conference of London, Great Britain, the United States, Russia, France, Italy and Japan were all in favour of this application of the doctrine of continuous voyage, but it was strongly objected to by Austria and by Germany, the latter country having fresh in its recollection its own recent protest during the South African War. In the course of the discussion, however, Germany modified her attitude,<sup>2</sup> and insisted only upon its abolition in the case of conditional contraband as a condition precedent to her acceptance of the list of free goods which we deal with later; and the ultimate decision reached was in the nature of a compromise on this basis.

Absolute  
contraband  
—destina-  
tion.

In laying down the rule as to the destination of articles of absolute contraband, the doctrine of continuous voyage was expressly recognised in the following terms:—

‘Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails transshipment or a subsequent transport by land’ (Art. 30).

Reference may be made to the explanatory observations contained in the memorandum drawn up by the British Government for the use of its representatives at the Conference: ‘When an adventure includes the carriage of goods to a neutral port, and thence to an ulterior destination, the doctrine of continuous voyage consists in treating for certain purposes the

<sup>1</sup> See *The Doelwijk* (1896): the judgment of the Italian Court is given, in a French translation, in *Archives diplomatiques* (Paris), Jan. 1897, pp. 81 *seq.*, and also in *Journal du droit international privé* (Paris), vol. xxiv, pp. 850 *seq.* The judgment is briefly set out in *Ruys v. Royal Exchange Assurance Co.* (1897), L.R. 2 Q.B. 135; 2 Com. Cas. 207. Cf. *Parl. Papers, Misc.* No. 5 (1909), Cd. 4555, p. 96.

<sup>2</sup> *Misc.* No. 5 (1909), Cd. 4555, p. 195.



whole journey as one transportation, with the consequences which would have attached had there been no interposition of the neutral port. The doctrine is only applicable when the whole transportation is made in pursuance of a single mercantile transaction preconceived from the outset. Thus it will not be applied where the evidence goes no further than to show that the goods were sent to the neutral port in the hopes of finding a market there for delivery elsewhere.' <sup>1</sup>

We shall see later how it was agreed that the doctrine be abolished in the case of conditional contraband, except when the enemy has no seaboard.

Questions of evidence were dealt with in the following Articles:— Proof of destination.

'Proof of the destination specified in Art. 30 is complete in the following cases:—

(1) When the goods are documented for discharge in an enemy port, or for delivery to the armed forces of the enemy.

(2) When the vessel is to call at enemy ports only, or when she is to touch at an enemy port or meet the armed forces of the enemy before reaching the neutral port for which the goods in question are documented (Art. 31).

'Where a vessel is carrying absolute contraband, her papers are conclusive proof as to the voyage on which she is engaged unless she is found clearly out of the course indicated by her papers and unable to give adequate reasons to justify such deviation' (Art. 32).

In Art. 31 (2) only the words 'enemy port' are used, but they are intended to be read in the light of the words 'territory belonging to or occupied by the enemy' in Art. 30; so that in an 'enemy port' is included 'a port occupied by the enemy.' Probably when the two Articles are read together the intention is sufficiently clear from the actual words used; but the official commentary which, as we have seen,<sup>2</sup> must probably be regarded as binding, removes all doubt on the point.

The meaning of 'proof of the destination is complete' ('la destination . . . est définitivement prouvée') is that though the onus of proof is on the captor, yet, once he has established the facts specified in Art. 31 (1) or (2), no evidence in rebuttal will be admitted. The documents in (1) are a clear

<sup>1</sup> *Parl. Papers, Misc. No. 4* (1909), p. 7.

<sup>2</sup> *Supra*, p. 331.

admission; (2) may cause more trouble in the case of vessels engaged in a voyage to and between many ports, but any other rule would probably make fraud too easy, or even if there were no fraud, would put it in the power of the enemy forcibly to requisition the goods.

Conditional  
contraband.

There being no prospect of any agreement to abolish entirely the doctrine of conditional contraband, the London Naval Conference of 1908-9 drew up a list of articles to be deemed to be included in that category. The general principle laid down by the majority of the powers at the Conference was that the belligerent had the right of drawing up and the duty of publishing such a list on the outbreak of war; and it was a marked advance in the direction of certainty and the avoidance of disputes that such a list should be settled beforehand.

A list proposed by the British Government was adopted with certain modifications in the following form:—

‘ The following Articles, susceptible of use in war as well as for purposes of peace, may without notice (“ de plein droit ”) be treated as contraband of war, under the name of conditional contraband:—

- (1) Foodstuffs.<sup>1</sup>
- (2) Forage and grain, suitable for feeding animals.
- (3) Clothing, fabrics for clothing, and boots and shoes, suitable for use in war.
- (4) Gold and silver in coin or bullion; paper money.<sup>2</sup>
- (5) Vehicles of all kinds available for use in war, and their component parts.
- (6) Vessels, craft, and boats of all kinds; floating docks, parts of docks and their component parts.
- (7) Railway material, both fixed and rolling stock, and material for telegraphs, wireless telegraphs and telephones.
- (8) Balloons and flying machines and their distinctive component parts, together with accessories and articles recognisable as intended for use in connection with balloons and flying machines.

<sup>1</sup> It was argued in 1916 before the Prize Court that coffee is not a foodstuff in the ordinary and usual sense of the term, but the Court decided that it is covered by the description ‘ foodstuffs ’: *The Indianic*; *The Sydland* (1916), 2 P.C. 255. (On Feb. 21, 1918, in an answer given in the House of Commons on behalf of the Food Controller, it was stated that tea is to be regarded as an article of food; but a Divisional Court later held it not to be so within the meaning of the Hoarding Order.) The term covers also salted casings or sausage skins: *The Cometa*; *The Salerno*; *The San Jose* (1916), 2 P.C. 306.

<sup>2</sup> This is declared in the Report not to include bills of exchange and cheques.

- (9) Fuel; lubricants.
- (10) Powder and explosives not specially prepared for use in war.
- (11) Barbed wire and implements for fixing and cutting the same.
- (12) Horseshoes and shoeing materials.
- (13) Harness and saddlery.
- (14) Field-glasses, telescopes, chronometers, and all kinds of nautical instruments' (Art. 24).

A provision for extension of this list was inserted, similar to that made in the case of absolute contraband:— Power to extend list.

'Articles susceptible of use in war as well as for purposes of peace, other than those enumerated in Arts. 22 and 24, may be added to the list of conditional contraband by a declaration, which must be notified in the manner provided for in Art. 23, paragraph 2' (Art. 25).

This gave expression to the view held with practical unanimity by the powers that in certain circumstances almost any article may acquire a contraband character if its destination is the armed forces of a belligerent; and that the most that could be done was to ensure that articles other than those specified should not be treated as contraband without notice.

Further protection was given to neutral trade by Art. 43:— Effect of ignorance of state of war.

'If a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband cannot be condemned except on payment of compensation;<sup>1</sup> the vessel herself and the remainder of the cargo are not liable to condemnation or to the costs and expenses referred to in Art. 41.<sup>2</sup> The same rule applies if the master, after becoming aware of the outbreak of hostilities, or of the declaration of contraband, has had no opportunity of discharging the contraband.

'A vessel is deemed to be aware of the existence of a state of war, or of a declaration of contraband, if she left a neutral port subsequently to the notification to the

<sup>1</sup> In *The Sorfareren* (1915), 1 P.C. 589, it was held that this provision applied only to neutral cargo; in the opinion of the Court the Article was not intended to save from condemnation contraband belonging to the enemy.

<sup>2</sup> *i.e.* the costs and expenses incurred by the captor when, though contraband is carried, the vessel is released. See p. 361, *infra*.



power to which such port belongs of the outbreak of hostilities or of the declaration of contraband respectively, provided that such notification was made in sufficient time. A vessel is also deemed to be aware of the existence of a state of war if she left an enemy port after the outbreak of hostilities.'

**Pre-emption.** The first paragraph of the above Article provides for a special form of pre-emption, a practice that has long been followed under the British system. According to the latter, when a doubt arose as to the contraband character of goods in question, the captor, instead of confiscating them, agreed to buy them at a reasonable market price, and allowed in addition a fair profit together with freight to the vessel.<sup>1</sup> This practice was recognised in the Naval Prize Act of 1864, sect. 38;<sup>2</sup> and the Manual of Naval Prize Law, 1888, provides accordingly (Art. 84): 'The carriage of goods conditionally contraband, and of such absolutely contraband goods as are in an unmanufactured state, and are the produce of the country exporting them, is usually followed only by the pre-emption of such goods by the British Government, which then pays freight to the vessel carrying the goods.'<sup>3</sup>

Notice of  
change in  
lists.

It was also thought desirable to provide for notice to neutrals, in case a belligerent should decide to treat any of the articles mentioned in the lists as free, or as conditional instead of absolute contraband:—

'If a power waives, so far as it is concerned, the right to treat as contraband of war an article comprised in any of the classes enumerated in Arts. 22 and 24, such intention shall be announced by a declaration, which must be notified in the manner provided for in Art. 23, paragraph 2' (Art. 26).

Nothing is said as to the effect of not giving such notification, but there would obviously be an inconvenient uncertainty if a belligerent, merely giving private instructions to his cruisers, were to treat certain articles as at one time contraband and at another free, or at one time absolute contraband and at another conditional. A claim may be made by neutrals that the treating of an article as free (or conditional, as the case may be) *ipso facto* debars the belli-

<sup>1</sup> *The Haabet* (1800), 2 C. Rob. 179; *The Sarah Christina* (1799), 1 C. Rob. 237 (absolute contraband goods in a raw state and the produce of the country exporting them).

<sup>2</sup> As to naval stores.

<sup>3</sup> During the Great War, such goods were confiscated, and freight as a rule was not allowed.

gerent from subsequently subjecting that article to different treatment without notice; but the true view probably is that only the terms of the Declaration can be relied upon in the absence of any notice to the contrary, and that if any particular merchant has been more leniently dealt with than he might have been under the Declaration, his case cannot of itself be relied upon by others as a precedent. But it would obviously be convenient to neutral trade that any such uncertainty should be removed; and it might have been expected that some rule would be laid down analogous to the rule that a blockade must be impartially enforced against all the world.

The rule as to destination of conditional contraband is set out in the following Articles:—

Destination  
of con-  
ditional con-  
triband.

- ‘ Conditional contraband is liable to capture if it is shown to be destined for the use of the armed forces or of a government department of the enemy state, unless in this latter case the circumstances show that the goods cannot in fact be used for the purposes of the war in progress. This latter exception does not apply to a consignment coming under Art. 24 (4) ’<sup>1</sup> (Art. 33).
- ‘ The destination referred to in Art. 33 is presumed to exist if the goods are consigned to enemy authorities, or to a contractor established in the enemy country who, as a matter of common knowledge, supplies articles of this kind to the enemy. A similar presumption of this kind arises if the goods are consigned to a fortified place belonging to the enemy, or other place serving as a base for the armed forces of the enemy. No such presumption, however, arises in the case of a merchant vessel bound for one of these places, if it is sought to prove that she herself is contraband.
- ‘ In cases where the above presumptions do not arise, the destination is presumed to be innocent.
- ‘ The presumptions set up by this Article may be rebutted ’ (Art. 34).

These Articles embody the British rule that proof of destination for the forces of the enemy is essential,<sup>2</sup> with the exception that in place of the words ‘ place of military or naval equipment ’ or similar words (which were given by way of example) there are used the words ‘ base for the armed

<sup>1</sup> *i.e.* gold and silver in coin or bullion, paper money.

<sup>2</sup> Cf. *The Jonge Margaretha* (1798), 1 C. Rob. 188; *The Edward* (1801), 4 C. Rob. 68; *The Ringende Jacob* (1798), 1 C. Rob. at p. 92; *The Twendre Brodre* (1801), 4 C. Rob. 33. Cf. *The Hakan* (1917), 2 P.C. 479.

forces.' The distinction does not appear likely to make much if any difference in practice.<sup>1</sup> Under the law (such as it is) as it stands there seems little doubt that a place regularly used for supplying, by railway transit, a place of equipment, would be treated in the same way as the actual place of equipment. The old cases decided when there were no railways afford no reliable guidance. No specific provision is made for the case of fraudulent concealment or spoliation of the ship's papers, which the British courts have held to raise the presumption of such destination; but there can be little doubt that fraud of this kind will always be considered to supply the proof required.<sup>2</sup>

It is to be noted that in Art. 34 the presumption of such destination is said to arise when the goods are consigned 'to a contractor established in the enemy country who, as a matter of common knowledge, supplies articles of this kind to the enemy' ('à un commerçant établi en pays ennemi et lorsqu'il est notoire que ce commerçant fournit à l'ennemi des objets et matériaux de cette nature'). The wording of this passage is somewhat loose, and it has been suggested that the words 'l'ennemi' refer to any enemy subject; with the result that the presumption of destination to hostile forces or government departments would arise in the case of any goods consigned to a merchant who supplies goods of that kind to the public generally; that is, in effect, to any merchant whatsoever. This interpretation would, however, render practically meaningless the whole of the provisions as to the distinction between absolute and conditional contraband; it is in flat contradiction of the official commentary which accompanies the Declaration;<sup>3</sup> and, it may be added, a similar use of the words 'l'ennemi' was held to mean the enemy Government by the Russian courts in *The Calchas* in 1904.<sup>4</sup>

Abolition of  
'continuous  
voyage.'

By Art. 35 it was provided that:—

'Conditional contraband is not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port.

<sup>1</sup> Thus in the Great War Hamburg was treated as a base of supply, and Belfast was so treated by Germany.

<sup>2</sup> Cf. *The Kim* (1915), 1 P.C. 405. See *infra*, p. 353.

<sup>3</sup> The words of the Report of the Drafting Committee are 'un commerçant établi en pays ennemi, qui est le fournisseur notoire du Gouvernement ennemi pour les articles dont il s'agit.' As to the authority of the commentary, see *supra*, p. 331.

<sup>4</sup> 1 R. & J. Pr. Cas. 118; and see p. 337, *supra*.



‘The ship’s papers are conclusive proof both as to the voyage on which the vessel is engaged and as to the port of discharge of the goods, unless she is found clearly out of the course indicated by her papers, and unable to give adequate reasons to justify such deviation.’

By this Article the doctrine of continuous voyage is abolished in the case of conditional contraband, and, subject to the proviso contained in the latter part of the Article, if goods are found to be documented to a neutral port, no further conjecture or examination is possible as to any destination beyond that port.

In the case of *The Kim*; <sup>1</sup> *The Alfred Nobel*; *The Björnsterne Björnson*; *The Fridland* (captured by the British in November, 1914), the Prize Court applied the doctrine of continuous transport, <sup>2</sup> so as to make conditional contraband goods liable to capture and confiscation when their actual and real ultimate destination is of an enemy character and they are intended for the use of the enemy forces. It was held that captors are not bound to prove the particular enemy port or place of ultimate destination; it is sufficient if they only show a highly probable military or government destination. Nor are they bound to prove an intention on the part of the shippers at the commencement of the voyage, ostensibly to a neutral port, of dispatching contraband goods to the enemy; it is sufficient if it is reasonably certain that the shippers were aware of the real ultimate hostile destination. <sup>3</sup>

The conclusiveness of the ship’s papers is intended, however, to depend upon their *bona fides*; and will not be allowed to cover fraud. The Report of the Drafting Committee must again be referred to as evidence of intention:—‘This rule as to the proof furnished by the ship’s papers is intended to prevent claims frivolously raised by a cruiser and giving rise to unjustifiable captures. It must not be too literally interpreted, for that would make all frauds easy. Thus it does not hold good when the vessel is encountered at sea clearly out of the course which she ought to have followed and unable to justify such deviation. The ship’s papers are then in contradiction with the true facts and lose all value as evidence;

Ship’s papers  
as proof.

<sup>1</sup> (1915), 32 T.L.R. 10; 1 P.C. 405. Similar decisions in the French Prize Court: *The Nieuw-Amsterdam* (1915), *Journal Officiel*, April 21, 1915; *The Oranje Nassau* (1915), *ibid.* Aug. 19, 1915; *The Eir* (1915), *ibid.* June 1, 1915; *The Narrovian* (1915), *ibid.* Aug. 4, 1915.

<sup>2</sup> As Art. 35 was adopted by Orders in Council subject to modifications; see *infra*, p. 364.

<sup>3</sup> Cf. *The Hakan* (1917), 2 P.C. 479; *The Louisiana* (1918), A.C. 461.

the cruiser will be free to decide according to the merits of the case. In the same way a search of the vessel may reveal facts which irrefutably prove that her destination or the place where the goods are to be discharged is incorrectly entered in the ship's papers. The commander of the cruiser is then free to judge of the circumstances and capture the vessel or not, according to his judgment. To resume, the ship's papers are proof unless facts show their evidence to be false. This qualification of the value of the ship's papers as proof seems self-evident and unworthy of special mention. The aim has been not to appear to weaken the force of the general rule, which forms a safeguard for neutral trade.'

The contention put forward by Great Britain during the Boer War<sup>1</sup> was recognised to be sound, and the following exception was made to the rule abolishing the doctrine of continuous voyage:—

'Notwithstanding the provisions of Art. 35, conditional contraband, if shown to have the destination referred to in Art. 33, is liable to capture in cases where the enemy country has no seaboard' (Art. 36).

Duration of  
liability to  
capture.

The liability to capture of a vessel carrying contraband begins when she leaves her port of departure and ends when she discharges the contraband cargo.<sup>2</sup> A passing doubt was thrown upon the unanimity with which this principle is accepted when in 1904 the Russian Prize Court at Vladivostock,<sup>3</sup> in condemning the *Allanton*, relied upon the fact that the vessel had carried contraband on a previous voyage; but the true principle was laid down by the Supreme Court at St. Petersburg:<sup>4</sup> 'The delivery by the *Allanton* on her first voyage of a cargo of Cardiff coal to the Japanese port of Sasebo cannot serve as sufficient ground for the condemnation of the cargo subsequently shipped from Muroran to Singapore, as, under Art. 11 of the Prize Regulations, vessels of neutral nationality are only liable to condemnation in the event of their being found in the act of conveying contraband to the enemy or to an enemy port, and not merely if they had on a previous occasion carried contraband to the enemy.'

The principle was enunciated in Arts. 37 and 38:—

'A vessel carrying goods liable to capture as absolute or conditional contraband may be captured on the high seas or in the territorial waters of the belligerents

<sup>1</sup> See p. 345, *supra*.

<sup>2</sup> *The Imina* (1800), 3 C. Rob. 168; *The Frederick Molke* (1798), 1 C. Rob. 86, 87.

<sup>3</sup> 1 R. & J. Pr. Ças. 1, at p. 4.

<sup>4</sup> *Ibid.* at p. 15. See p. 341, *supra*.

throughout the whole of her voyage, even if she is to touch at a port of call before reaching the hostile destination' (Art. 37).

'A vessel may not be captured on the ground that she has carried contraband on a previous occasion if such carriage is in point of fact at an end' (Art. 38).

In some cases the English courts<sup>1</sup> have, in exceptional circumstances of fraud, held liable to condemnation vessels on the homeward voyage for having carried contraband on the outward voyage; *e.g.* when contraband goods were carried from Europe to the East Indies, with false papers and false destination, which were intended to conceal the real object of the expedition. No provision is made in the Declaration for such a contingency. The exception to the general rule is not unreasonable, and a vessel clearly proved guilty of such conduct can scarcely complain of hardship. But on the words of the Declaration no such exception would appear to be permissible. In *The Nancy*<sup>2</sup> it was justified by the connection between the outward and the homeward cargo, the latter being the proceeds of the former, and by treating the whole voyage as one adventure tainted with fraud.

It was held in the case of *The Imina*<sup>3</sup> that if a destination originally hostile is changed in good faith and the ship is captured on its changed course, the offence is no longer committed: <sup>4</sup> 'to say that it (the cargo) is nevertheless exposed to condemnation on account of the original destination as it stood in the minds of the owners, would be carrying the penalty of contraband further than it has ever been carried by this or the superior court.'

In like manner,<sup>5</sup> if the port of destination, originally hostile, ceases to be so by capture or surrender, the offence ceases and the goods are no longer contraband.

There is nothing in the Declaration of London to throw any doubt upon either of these principles.

One of the results of the Conference is to be found

Free goods.

<sup>1</sup> *The Rosalie and Betty* (1800), 2 C. Rob. 343; *The Nancy* (1800), 3 C. Rob. 122; *The Margaret* (1810), 1 Acton, 333; *The Trende Sostre* (1807), 6 C. Rob. 390; *The Alwina* (1916), 2 P.C. 186; (1918), A.C. 444.

<sup>2</sup> (1800), 3 C. Rob. 122. This case was really one of enemy property; and apparently the vessel was not condemned. Apart from this and other cases involving illegal trade and enemy property, there appears to be no English decision condemning a vessel solely for the carriage of contraband on a previous voyage.

<sup>3</sup> (1800), 3 C. Rob. 167.

<sup>4</sup> Cf. *The Lydia* (1906), 2 R. & J. Pr. Cas. 359; *The Lincluden* (1903), 2 R. & J. Pr. Cas. 341; *The Alwina* (1916), 2 P.C. 186, at p. 200.

<sup>5</sup> *The Trende Sostre* (1807), 6 C. Rob. 390n.



in the treatment of articles in the second class of the Grotian category, 'things which merely serve for pleasure and have no warlike use.'

The general principle is laid down in Art. 27:—

'Articles which are not susceptible of use in war may not be declared contraband of war.'

By agreeing to the abandonment of the doctrine of continuous voyage in relation to conditional contraband, the British Government succeeded in securing the assent of the other nations to a list of specific articles which, without prejudice to the generality of Art. 27, were to be regarded as in no circumstances contraband of war. These were set out in Art. 28:—

'The following articles may not be declared contraband of war:—

(1) Raw cotton, wool, silk, jute, flax, hemp and other raw material of the textile industries, and yarns of the same.

(2) Oil seeds and nuts; copra.

(3) Rubber, resins, gums and lacs; hops.

(4) Raw hides and horns; bones and ivory.

(5) Natural and artificial manures, including nitrates and phosphates for agricultural purposes.

(6) Metallic ores.

(7) Earths, clays, lime, chalk, stone, including marble, bricks, slates and tiles.

(8) China ware and glass.

(9) Paper and paper-making materials.

(10) Soap, paint and colours, including articles exclusively used in their manufacture, and varnish.

(11) Bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia and sulphate of copper.

(12) Agricultural, mining, textile and printing machinery.

(13) Precious and semi-precious stones, pearls, mother-of-pearl and coral.

(14) Clocks and watches, other than chronometers.

(15) Fashion and fancy goods.

(16) Feathers of all kinds, hairs and bristles.

(17) Articles of household furniture and decoration, office furniture and requisites.<sup>1</sup>

<sup>1</sup> It was only a makeshift agreement at the Conference, and it could not survive the experience in the Great War, e.g. as to cotton, wool, oil seeds, raw hides, rubber, copper, etc.; see *infra*, pp. 362, 363.

The Report adds that this list is not necessarily exhaustive, and that it merely enumerates specific examples of the class of articles generalised in Art. 27; so that commodities not mentioned in the list are equally free if they are of a similar character and are not susceptible of use in war.

The above list was further extended by Art. 29:—

‘ Likewise the following may not be treated as contraband of war:—

(1) Articles serving exclusively to aid the sick and wounded. They can, however, in case of urgent military necessity and subject to the payment of compensation, be requisitioned, if their destination is that specified in Art. 30.<sup>1</sup>

(2) Articles intended for the use of the vessel in which they are found, as well as those intended for the use of her crew and passengers during the voyage.’

Hospital ships are specially dealt with under the Hague Convention, No. X (1907),<sup>2</sup> and the above Article does not apply to them; and the right of requisition arises only where the articles have an enemy destination.

The ordinary penalty for carriage of contraband is confiscation of the cargo:—

Penalty for carrying contraband.

‘ Contraband goods are liable to condemnation ’ (Art. 39).

In the case of conditional contraband there has been in the past a practice of substituting pre-emption for confiscation, that is, purchase of the goods at the market value, with the addition of ten per cent. for profit;<sup>3</sup> and in some cases the same privilege was extended to goods which were clearly contraband but were the products of the country exporting them.<sup>4</sup>

Applied to undoubted contraband this doctrine is a concession to the neutral; but serious trouble was raised by its application by Great Britain in 1795 to articles which were not contraband at all.<sup>5</sup>

<sup>1</sup> *i.e.* territory belonging to or occupied by the enemy or the armed forces of the enemy. See p. 346, *supra*.

<sup>2</sup> Misc. No. 5 (1909), Cd. 4555, p. 356; and see p. 234, *supra*.

<sup>3</sup> *The Haabet* (1800), 2 C. Rob. 174, 182. A case of a cargo of corn.

<sup>4</sup> *The Twee Juffrewen* (1802), 4 C. Rob. 242, 243. Cf. *The Eliza Holtz*, Adm. July 3, 1784, referred to in *The Ringende Jacob* (1798), 1 C. Rob. 91; *The Sarah Christina* (1799), 1 C. Rob. 241.

<sup>5</sup> Hall, 7th ed. pp. 713, 714.

The Naval Prize Act, 1864, sect. 38, adopted this right of pre-emption;<sup>1</sup> and in accordance therewith the Manual of Naval Prize Law (1888), Art. 84, says: 'The carriage of goods conditionally contraband, and of such absolutely contraband goods as are in an unmanufactured state, and are the produce of the country exporting them, is usually followed only by the pre-emption of such goods by the British Government, which then pays freight to the vessel carrying the goods.'

In the Memoranda drawn up by the powers for the purposes of the Conference, Austria-Hungary, while admitting that in theory and practice absolute contraband was subject to confiscation,<sup>2</sup> argued in favour of the principle of indemnity in all cases, with an option of sequestration only, if the belligerent desired it; but apart from this, no nation put forward any claim to the treatment of any contraband goods as subject merely to pre-emption, except in the case, already mentioned, of vessels encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband applying to their cargo (Art. 43).<sup>3</sup>

It seemed, therefore, that in view of the comprehensive character of the words of Art. 39, the doctrine of pre-emption might be regarded as a thing of the past; and indeed, with the clear enumeration of what was to be contraband and what was not, it was thought that the greater part of the reason for the doctrine had disappeared.

Fate of the  
vessel.

With regard to the treatment of the vessel itself, practice has varied very greatly. The ancient rule was that the vessel is subject to condemnation on the ground that she was contaminated by the contraband goods she had on board; and it was defended by Sir W. Scott in *The Neutralitet*:<sup>4</sup> 'If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent. The policy of modern times has, however, introduced a relaxation on this point; and the general rule now is that the vessel does not become confiscable for that act. But this rule is liable to exceptions. Where a ship belongs to the owner of the cargo, or where the ship is going on such service under a false destination or false papers, these circumstances of aggravation have been held to constitute excepted cases out

<sup>1</sup> In regard to naval stores.

<sup>2</sup> *Misc. No. 5* (1909), Cd. 4555, p. 70.

<sup>3</sup> See p. 349, *supra*. Cf. *The Rijn* (1917), 2 P.C. 507 (where it was held that Art. 43 applies only to neutral ships and neutral cargoes); *The Sorfareren* (1915), 1 P.C. 589.

<sup>4</sup> (1801), 3 C. Rob. 295.



of the modern rule, and to continue them under the ancient one.' <sup>1</sup>

The modern rule appeared in treaties so early as 1650 (between Spain and the United Provinces) <sup>2</sup> and 1655 (between France and the Hanseatic Towns), and was well established by the end of the eighteenth century; though Russia so late as 1854 claimed the right to confiscate neutral vessels carrying contraband, <sup>3</sup> and even in 1904 issued a Declaration to the effect that 'neutral ships captured while engaged in flagrant act of contraband can, according to circumstances, be seized and even confiscated.' It was illustrated in *The Jonge Tobias*, <sup>4</sup> where, the owner of the cargo being part owner of the vessel, his share in the vessel was condemned, while the other part owners were held to be not affected by his acts; in *The Staadt Embden*, <sup>5</sup> where the ship and the innocent portion of the cargo belonging to the owner of the contraband were involved in the same penalty; and in *The Franklin*, <sup>6</sup> where the vessel was condemned on the ground of a false destination. <sup>7</sup>

Forcible resistance to the captor is also under the modern rule a ground for condemnation of the vessel. <sup>8</sup>

Another method of dealing with the question was to make the fate of the ship depend upon the quantity of contraband carried. By the French regulations of 1778, the ship was confiscated if three-quarters of its cargo was contraband, <sup>9</sup> and the same rule was adopted in 1870; <sup>10</sup> and though the principle seems not to have been generally acted upon in practice to any appreciable extent, it was put before the Conference as in theory reasonable by Germany, France, Japan (which named no definite proportion, but only suggested that the ship be forfeited when the transport of contraband is the principal object of the voyage), the Netherlands (which similarly required the contraband to be 'an important part' of the cargo) and Russia.

Quantity of  
contraband  
as a test.

The Conference adopted the suggestion that some such

<sup>1</sup> Cf. *The Hakan* (1917), 2 P.C. 479 (where the decision in *The Neutralitet* is discussed and explained).

<sup>2</sup> Atherley-Jones, *Commerce in War*, p. 378.

<sup>3</sup> Declaration of April 19, 1854; see Atherley-Jones, *op. cit.* at p. 379.

<sup>4</sup> (1799), 1 C. Rob. 329.

<sup>5</sup> (1798), 1 C. Rob. 26.

<sup>6</sup> (1801), 3 C. Rob. 217.

<sup>7</sup> Cf. also *The Edward* (1801), 4 C. Rob. 68; *The Richmond* (1804), 5 C. Rob. 325; *The Ranger* (1805), 6 C. Rob. 125.

<sup>8</sup> *Misc. No. 5* (1900), Cd. 4555, pp. 70, 71. Cf. *The Jonge Tobias* (1799), 1 C. Rob. 329.

<sup>9</sup> Atherley-Jones, *op. cit.* p. 378.

<sup>10</sup> Barboux, *Jurisprudence du conseil des prises*, 1870-71, Appendix, Art. 6.

proportion should be taken, and Article 40 represents a compromise on the question of the amount of such proportion:—

‘A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume or freight, forms more than half the cargo.’<sup>1</sup>

With regard to the proportion of the contraband goods on board the vessel and the grounds of the rule arrived at, the official commentary on the Declaration says: ‘It was universally admitted [at the London Naval Conference] that in certain cases the condemnation of the contraband is not enough, and that the vessel herself should also be condemned, but opinions differed as to what these cases were. It was decided to fix upon a certain proportion between the contraband and the total cargo. But the question divides itself into two parts: (1) What shall be the proportion? The solution adopted is the mean between those proposed, which varied from a quarter to three-quarters. (2) How shall this proportion be reckoned? Must the contraband form more than half the cargo in volume, weight, value or freight? The adoption of a single fixed standard gives rise to theoretical objections, and also to practices intended to avoid condemnation of the vessel in spite of the importance of the cargo. If the standard of weight or volume is adopted, the master will ship innocent goods sufficiently bulky or weighty in order that the volume or weight of the contraband may be less. A similar remark may be made as regards the standard of value or freight. The consequence is that, in order to justify condemnation, it suffices that the contraband should form more than half the cargo according to any one of the above standards. This may seem severe; but, on the one hand, any other system would make fraudulent calculations easy, and, on the other, it may be said that the condemnation of the vessel is justified when the carriage of contraband formed an important part of her venture—a statement which applies to all the cases specified.’

<sup>1</sup> If the contraband exceeds this proportion, the ignorance of the ship-owner is immaterial: *The Lorenzo* (1914), 1 P.C. 226. Cf. *The Hakan* (1916), 2 P.C. 210 (a vessel proceeding directly to an enemy port); *The Maracaibo* (1916), 2 P.C. 294 (vessel on a voyage to a neutral port with contraband destined for enemy territory). In Oct. 1917, the Privy Council, affirming the decision in *The Hakan*, held that the fundamental principle was that a neutral vessel would not be confiscated for carrying contraband without the knowledge of the owner, or possibly of the charterer or master, as to the nature of the cargo; but in some cases the presumption of knowledge is rebuttable, in other cases irrebuttable, according to the proportion of the contraband: *The Hakan* (1917), 34 T.L.R. 11; 2 P.C. 479. Cf. *The Hillerod* (1918), A.C. 412.

Though it was necessary to adopt all the four standards in order to minimise the possibility of devices being employed to defeat the intention of the clause, the real safeguard against any systematic carrying of just such a quantity of contraband as will enable the ship to avoid confiscation lies in Art. 41:—

‘ If a vessel carrying contraband is released, the costs and expenses incurred by the captor in respect of the proceedings in the National Prize Court and of the custody of the ship and cargo during the proceedings shall be borne by the ship.’

The expenses of the custody of the vessel are in the Report of the Drafting Committee expressly stated to include the keep of the captured vessel’s crew.

By the British practice <sup>1</sup> a ship was refused her freight and expenses, unless as in *The Neptunus* <sup>2</sup> the amount of contraband carried was very small; and the American courts followed a similar rule.<sup>3</sup> The above Article apparently goes rather further by making the offending vessel liable for costs.

The principle that innocent goods carried in the same vessel go free unless they belong to the owner of the contraband goods <sup>4</sup> is embodied in Art. 42:—

Innocent goods in the same vessel.

‘ Goods which belong to the owner of the contraband, and are on board the same vessel, are liable to condemnation.’

And by Art. 44 it was provided that:—

‘ A vessel which has been stopped on the ground that she is carrying contraband, and which is not liable to condemnation on account of the proportion of contraband on board, may, when the circumstances permit, be allowed to continue her voyage if the master is willing to hand over the contraband to the belligerent warship. The delivery of the contraband must be entered by the captor in the log-book of the vessel stopped, and the master must give the captor duly certified copies of all relevant papers. The captor is at liberty to destroy the contraband that has been handed over to him under these conditions.’

<sup>1</sup> *The Sarah Christina* (1799), 1 C. Rob. 237; *The Mercurius* (1799), 1 C. Rob. 288.

<sup>2</sup> (1800), 3 C. Rob. 108. Cf. *The Jeanne*; *The Vera*; *The Forsvik*; *The Albania* (No. 2) (1916), 2 P.C. 300.

<sup>3</sup> *The Commercen* (1816), 1 Wheat. 387; *The Peterhoff* (1866), 5 Wall. 28.

<sup>4</sup> *The Stadt Embden* (1798), 1 C. Rob. 26; *The Kronprinsessan Margareta* (1917), 2 P.C. 409.



This provision is purely permissive. It was suggested that it should be made obligatory upon the captor to allow the vessel to proceed upon surrender of the goods, provided that such surrender were in the circumstances possible, and there were no well-founded suspicions that the vessel was carrying other contraband than that disclosed; but there was no agreement that the imposition of such an obligation was desirable. It has been advocated by some writers and adopted in many treaties,<sup>1</sup> but it would probably prove unworkable in practice.

Contraband  
in the Great  
War.

During the Great War various changes were made by the belligerents in the law of contraband as contained in the Declaration of London, which—as has already been pointed out—is not binding as an international instrument owing to its non-ratification by several states. It is beyond the scope of the present work to make more than a brief reference to the repeated modifications that were effected. As soon as the war broke out Germany and Austria notified their adherence to the provisions of the Declaration. France and Russia declared that they would conform thereto so far as was practicable. Great Britain also declared her adoption thereof as though it had been duly ratified, but subject to certain additions and modifications. The French and Russian Governments then announced that they had made similar changes. When Italy entered the war, she too adopted the Declaration with certain modifications. Germany and Austria protested (October, 1914) against the changes announced, but soon they likewise made various changes, similar for the most part to those made by the other belligerents.<sup>2</sup>

Lists of  
contraband.

On the declaration of war Great Britain issued lists of absolute and conditional contraband conformably to those of the Declaration,<sup>3</sup> save that in the former were included 'aeroplanes, airships, balloons and aircraft of all kinds, and their component parts, together with accessories and articles recognisable as intended for use in connection with balloons and aircraft.' France and Russia issued similar lists, whilst Germany and Austria followed those of the Declaration. The war had been only a few weeks in progress when it was realised that owing to new conditions further and continuing changes would be necessitated. A proclamation of September 21, 1914,

<sup>1</sup> See the list set out in Hall, 7th ed. p. 715.

<sup>2</sup> The changes, lists of contraband, etc., announced in proclamations and Orders in Council are to be conveniently found in *Manual of Emergency Legislation*, ed. by A. Pulling, 1914, etc.

<sup>3</sup> Arts. 22, 24.

added to the list of conditional contraband unwrought copper, lead, glycerine, ferrochrome, iron ore, rubber, and hides and skins (not including dressed leather). On October 29 these lists were withdrawn, and new lists were issued increasing largely the number of articles of absolute contraband, *e.g.* iron, nickel, copper, lead, aluminium, motor vehicles of all kinds and their component parts, motor tyres, rubber, mineral oils and motor spirit (except lubricating oils), sulphuric acid, range finders, barbed wire and implements for fixing and cutting the same. Similar lists were afterwards adopted by France and Russia. Germany added to the list of conditional contraband (by decrees of October 18, November 23 and December 14) lead, copper, lumber, wood, coal-tar, sulphur, sulphuric acid, aluminium and nickel. On December 23 the British lists were withdrawn, and alterations were made in the absolute list, which was to include various chemical ingredients and metals susceptible to use for purposes of war; *e.g.* sulphur, glycerine and barbed wire were transferred thereto from the conditional list, whilst submarine sound signalling apparatus was a new addition. Again France and Russia issued similar lists. On March 11, 1915, the British absolute list was greatly extended: raw wool, woollen yarns, tin, castor oil, paraffin wax, lubricants, hides, skins, leather, ammonia, aniline, etc.; to the conditional list were added tanning substances, and the number of articles of 'foodstuffs' and 'feeding stuffs for animals' was considerably enlarged. France at the same time announced similar modifications, and Russia and Italy adopted lists to the like effect. Germany retaliated on April 18, 1915, drawing up lists much the same as the British, but making coal and coke absolute contraband; unlike Great Britain, she issued a free list, which, but for the omission of metallic ores, rubber, oil seeds and nuts, practically corresponds to Art. 28 of the Declaration. On May 27, 1915, the British absolute list was once more enlarged, *e.g.* toluol, lathes and other machines, machine-tools, certain maps and plans; and linseed oil was added to the conditional list. On August 21, 1915, Great Britain and France included raw cotton in the absolute list. The lists were again revised on October 14, 1915, and on subsequent dates. On April 2, 1916, gold, silver, paper money, negotiable instruments and realisable securities were made absolute contraband; and on November 2, 1916, and July 2, 1917, the number of such articles was amplified. Moreover, on April 13, 1916, a list of 169 separate items was issued, making no distinction between absolute and conditional contraband; this was justified on the

ground that the circumstances of the war rendered a distinction valueless, that it was impossible to discriminate between the armed forces and the civilian population, of whom such enormous numbers were engaged in war work, and that the German Government had assumed control of nearly all the articles enumerated in the list of conditional contraband.<sup>1</sup> However, the list of July 2, 1917, preserved the distinction between absolute and conditional contraband.

Destination.

The Orders in Council of August 20 and October 29, 1914, accepted the provisions of the Declaration as to the destination of absolute contraband. But in reference to conditional contraband the former Order extended Art. 34, making the destination referred to in Art. 33 deducible from sufficient evidence, and presumable 'if the goods are consigned to or for an agent of the enemy state, or to or for a merchant or other person under the control of the authorities of the enemy state.' The latter Order similarly provided an additional presumption of the hostile destination. The Order of August 20 applied the doctrine of continuous voyage for conditional contraband; but this was changed by the Order of October 29, which made conditional contraband seizable on board a neutral vessel bound for a neutral port if the goods are consigned 'to order,' or if the ship's papers do not indicate a consignee, or indicate one in territory belonging to or occupied by the enemy. France and Russia followed a like course. On April 18, 1915, Germany announced practically similar rules; and on June 3, 1915, did the same with minor modifications. On March 30, 1916, an Order in Council made a further change in regard to the destination; hostile destination is to be presumed 'if the goods are consigned to or for a person, who during the present hostilities has forwarded imported contraband goods to territory belonging to or occupied by the enemy,' and the owner of the goods was charged with the onus of proving an innocent destination.

Continuous  
voyage.

The doctrine of continuous voyage—excluded by the Declaration in the case of conditional contraband—was applied to conditional contraband by the Orders in Council of August 20, 1914, October 29, 1914, and March 30, 1916; and it was so applied by the Prize Courts.<sup>2</sup>

The above provisions as to destination and continuous voyage contained in the Order of October 29, 1914, and subsequent Orders, were cancelled on July 7, 1916, by an Order

<sup>1</sup> *Parl. Papers, Misc. No. 12* (1916).

<sup>2</sup> e.g. in *The Kim* (1915), 1 P.C. 405; *The Louisiana* (1918), A.C. 461. See Hall, 7th ed. p. 731.



in Council designated 'The Maritime Rights Order in Council, 1916,' which laid down the following rules:—

'(a) The hostile destination required for the condemnation of contraband articles shall be presumed to exist, until the contrary is shown, if the goods are consigned to or for an enemy authority, or an agent of the enemy state, or to or for a person in territory belonging to or occupied by the enemy, or to or for a person who, during the present hostilities, has forwarded contraband goods to an enemy authority, or an agent of the enemy state, or to or for a person in territory belonging to or occupied by the enemy, or if the goods are consigned "to order," or if the ship's papers do not show who is the real consignee of the goods.

'(b) The principle of continuous voyage or ultimate destination shall be applicable both in cases of contraband and of blockade.

'(c) A neutral vessel carrying contraband with papers indicating a neutral destination, which, notwithstanding the destination shown on the papers, proceeds to an enemy port, shall be liable to capture and condemnation if she is encountered before the end of her next voyage.

'(d) A vessel carrying contraband shall be liable to capture and condemnation if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo.

'And it is hereby further ordered as follows:—

'(i) Nothing herein shall be deemed to affect the Order in Council of March 11, 1915, for restricting further the commerce of the enemy, or any of His Majesty's Proclamations declaring articles to be contraband of war during the present hostilities. . . .'

At the same time France substituted other provisions for those contained in previous decrees. Both Great Britain and France set forth their reasons for withdrawing their earlier Orders adopting the provisions of the Declaration of London, and declared that they would follow simply the customary rules of international law and the stipulations contained in international conventions relating to the laws of war.<sup>1</sup>

Soon after the Declaration of London was drawn up it was contended in many quarters that it was in many respects unsatisfactory. The events of the Great War clearly showed the unsatisfactory character of its provisions relating to contraband trade. In the first place the inferences as to hostile destination are too vague to be of real practical use. As Prof.

Unsatisfactory character of rules as to contraband.

<sup>1</sup> *Parl. Papers, Misc. No. 22 (1916).*

J. B. Moore says: ' They would seem to justify in almost any case the presumption that the cargo, if bound to an enemy port, was destined for the use of the armed forces or of a government department of the enemy state. Any merchant established in the enemy country, who deals in the things described, will sell them to the Government; and if it becomes public that he does so, it will be " well known " that he supplies them. Again, practically every important place is a " fortified place "; and yet the existence of fortifications would usually bear no relation whatever to the eventual use of provisions and various other articles mentioned. Nor can it be denied that in this age of railways almost any place may serve as a " base " for supplying the armed forces of the enemy. And of what interest or advantage is it to a belligerent to prevent the enemy from obtaining supplies from a " base," from a " fortified place," or from a merchant " well known " to deal with him in his own country, where, the entire community being subject to his authority, he can obtain by requisition whatever he needs, if dealers in commodities hesitate to sell voluntarily? ' Accordingly, the American international jurist thinks that a solution is to be found, if not in the abolition of the principle of contraband, at all events in the adoption of a plan whereby, first, conditional contraband would be abolished, and secondly, a single list would be prepared, and further in the co-operation of belligerents and neutrals for certifying the contents of cargoes, so that the risk of capture would be borne by those who voluntarily incurred it. Thus harassing searches and detentions would be avoided.<sup>1</sup>

<sup>1</sup> *Amer. Journ. of Int. Law*, vol. ix (1915), pp. 400, 401.

## CHAPTER V

### THE LAW OF BLOCKADE

THE question of the rules regulating a blockade was the first that engaged the attention of the delegates at the Conference of London. A series of twenty-one Articles was drawn up and agreed upon, partly as representing the generally recognised principles of international law and partly by way of conventional stipulation on points where no such generally recognised principle could be found.

With pacific blockade, which is dealt with elsewhere,<sup>1</sup> these rules had nothing to do; the intention being to treat of blockade solely as an operation of war.

A blockade may be generally described as the obstruction of commerce to or from a defined part of the enemy's coast by sea as an incident in hostile operations.<sup>2</sup> It is practically always carried out by a warship or warships of a belligerent; though in certain circumstances it may be effected by land batteries commanding the approach to a blockaded port. But it must in that case be supported 'by a naval force sufficient to warn off innocent, and capture offending vessels attempting to enter';<sup>3</sup> so that such exception to the rule that a blockade is an operation of warships is one of little substance, and indeed did not require to be dealt with specifically in the Declaration of London, which does not attempt to define the word 'blockade.' That the operation is carried on by ships is, however, the underlying assumption of the whole of the Articles on the subject, and the true view probably is that the operations of land batteries are supplementary to the operations of the ships, as is, for instance, the blocking up of a channel by stones, sunken ships or other obstructions: a method of procedure against which Great Britain, with no very good grounds, protested, when it was applied to the approaches to Charleston and Savannah by the Federal forces in 1861.<sup>4</sup>

Definition of  
blockade.

<sup>1</sup> See pp. 179, 322, *supra*.

<sup>2</sup> Cf. the British memorandum, *Parl. Papers, Misc. No. 4* (1909), p. 5; see also No. 5 (1909), p. 35.

<sup>3</sup> *The Circassian* (1864), 2 Wall. 135, 149.

<sup>4</sup> Lawrence, *Principles*, 4th ed. p. 685.



Limitations  
of blockade.

The limitations of a blockade are defined in the Declaration as follows:—

- ‘ A blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy (Art. 1).
- ‘ The blockading forces must not bar access to neutral ports or coasts ’ (Art. 18).

These rules follow as of course from the fact that a belligerent can only direct a blockade against his enemy, and in most cases they may seem to be a mere truism. But a port may be blockaded by the stationing of a ship or ships at the mouth of a river, or of a narrow passage, many miles away; one ship, for instance, blockaded Riga in 1854 by lying at the entrance of a channel 120 miles distant;<sup>1</sup> and Buenos Ayres was blockaded from the neighbourhood of Montevideo.<sup>2</sup> When, therefore, such a river or channel leads to a neutral as well as to an enemy port, or forms the boundary line between neutral and enemy territory, the above rules become of great practical importance, and they enunciate the principle laid down by Lord Stowell in 1801,<sup>3</sup> when a notified blockade of Holland was held not to be violated by a destination to Antwerp, and the Scheldt was treated as a conterminous river, not within Dutch territory. This case was followed by the United States courts during the American Civil War,<sup>4</sup> when the Texan shore of the Rio Grande being blockaded, trade with Matamoras on the Mexican shore was held to be lawful, subject to the duty of the neutral not to place his ship in suspicious propinquity to the blockaded shore. In the Crimean War the British and French fleets blockaded the mouth of the Danube, whereupon the neutral states of Bavaria and Würtemberg protested. In the Franco-German War, however, when the French blockaded the German coast of the North Sea, they exempted the mouth of the River Ems, which flows partly through Holland. In the case of internationalised canals, such as Suez and Panama, blockade is prohibited by express treaty stipulations.

Blockade  
must be  
effective.

It was laid down by the fourth Article of the Declaration of Paris (1856) that blockades to be valid must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy. Paper blockades, or such as

<sup>1</sup> *The Franciska* (1854), Spinks, 115.

<sup>2</sup> Hall, 7th ed. p. 769.

<sup>3</sup> *The Frau Isabe* (1801), 4 C. Rob. 63; Hall, p. 781. Cf. *The Luna* (1810), Edw. 190, which was followed in *The Sigurd* (1917), 34 T.L.R. 16.

<sup>4</sup> *The Peterhoff* (1866), 5 Wall. 28, 52; *The Dashing Wave*, *ibid.* 170; *The Volant*, *ibid.* 178; *The Science*, *ibid.* 179; Hall, p. 781.

are not supported by the material strength to make them effective on the spot, have been by universal agreement for a long time inadmissible. The Napoleonic wars pushed this form of blockade to its illogical conclusion. On May 16, 1806, a British Order, purporting to be retaliatory, announced a blockade extending from Brest to the Elbe. This was answered by the French Decree of Berlin (1806):—

(1) 'Les Îles Britanniques sont déclarées en état de blocus.'

(2) 'Tout commerce et toute correspondance avec elles est défendu.'

This decree was followed by further retaliatory orders issuing from Great Britain, the legality of which was vindicated by Lord Stowell in *The Snipe*:<sup>1</sup> 'These orders were intended and professed to be retaliatory against France; without reference to that character they have not, and would not have, been defended; but in that character they have been justly, in my apprehension, deemed reconcilable with those rules of natural justice by which the international communications of independent states are usually governed.'

That the action of Great Britain was justified even on the ground of retaliation has been questioned by such high authorities as Sir R. Phillimore<sup>2</sup> and Sir William Harcourt;<sup>3</sup> but the validity of the principle of retaliation was not doubted by contemporary British jurists, and in the Great War it was applied by the belligerents, and upheld by the British and French Prize Courts.<sup>4</sup>

The principle of the necessity of effectiveness was recognised by the Armed Neutralities of 1780 and 1800; it was acted upon in such cases as *The Arthur*,<sup>5</sup> *The Nancy*,<sup>6</sup> and *The Franciska*;<sup>7</sup> it was confirmed in numerous treaties, notably in those between Great Britain and the United States in 1794, between Great Britain and Russia in 1801,<sup>8</sup> between France and Denmark in 1742, and between Russia and Denmark in 1818;<sup>9</sup> its validity was recognised, though its application was rather strained, when in 1861 the United States blockaded a Confederate coast-line of over 3000 miles; and it was the basis of the successful British protests against the French blockade

<sup>1</sup> (1812), Edwards, 381, 382.

<sup>2</sup> *International Law*, vol. iii, sect. 321.

<sup>3</sup> *Letters of Historicus*, p. 94.

<sup>4</sup> Cf. *The Stigstad* (1916), 2 P.C. 179; *The Zamora* (1916), 2 P.C. 1; *The Leonora and other vessels* (1918), 34 T.L.R. 366. See *supra*, p. 320.

<sup>5</sup> (1814), 1 Dodson, 423.

<sup>6</sup> (1809), 1 Acton, 58.

<sup>7</sup> (1854), Spinks, 111; 10 Moore, P.C.C. 37.

<sup>8</sup> Wheaton (ed. Phillipson), p. 773.

<sup>9</sup> Woolsey, *International Law*, 5th ed. p. 353.

of Formosa in 1884<sup>1</sup> and against the blockade of the insurgent Haytian ports in 1888.<sup>2</sup> The principle was thus well established long before its enunciation in the Declaration of Paris in 1856; and in the Declaration of London (1909) it was only found necessary to repeat the words used in the earlier Declaration as follows:—

‘ In accordance with the Declaration of Paris of 1856, a blockade, in order to be binding, must be effective, that is to say, it must be maintained by a force sufficient really to prevent access to the enemy coast-line ’ (Art. 2).

Attempts have been made from time to time to produce what would be in effect a paper blockade by Governments struggling against insurgents in their own territory. New Granada in such circumstances attempted to close certain ports by an order in 1861,<sup>3</sup> and in 1862 the United States proposed to adopt the same measure in regard to the ports in the southern states. British protests were in both cases successful, and in 1885 the United States herself insisted on the illegality of such an attempt when it was made by the President of Colombia.

Criterion of  
‘ effective-  
ness.’

It is agreed then that blockades must be effective, but there is no agreement to define ‘ effectiveness ’; a fact which is recognised by Art. 3 of the Declaration of London:—

‘ The question whether a blockade is effective is a question of fact.’

British and  
American  
view.

Each case can only be decided in accordance with its own circumstances, first by the national tribunal, and then by the International Court of Appeal, when such court comes to be established. In England<sup>4</sup> and in America<sup>5</sup> the principle applied in the past has been that a blockade is sufficiently effective provided that, under normal conditions, a breach of it would be unlikely to succeed, or at least very difficult. During the Crimean War, the Privy Council held that a place must be ‘ watched by a force sufficient to render the egress or ingress dangerous: or in other words, save under peculiar

<sup>1</sup> *Ann. Register*, 1884, p. 374.

<sup>2</sup> *London Gazette*, July 12, 1889. For an interesting case in the Russo-Turkish War of 1877 in regard to the efficiency of a blockade, see Wheaton (ed. Phillipson), p. 775.

<sup>3</sup> Hall, 7th ed. p. 34n.; Lawrence, *Principles*, 4th ed. p. 686.

<sup>4</sup> *The Columbia* (1799), 1 C. Rob. 156; *The Hoffnung* (1805), 6 C. Rob. 116; *The Frederick Molke* (1798), 1 C. Rob. 86.

<sup>5</sup> *Radcliff v. United Insur. Co.* (1810), 7 Johnson, 37, 53.



circumstances, as fogs, violent winds, and some necessary absences, sufficient to render the capture of vessels attempting to go in or come out most probable.' <sup>1</sup> That the blockading squadron is small, or is a long way off, is not in the least conclusive against the validity of the blockade. Not nearness but capability to maintain the blockade is the true criterion.<sup>2</sup> Lord Chief Justice Cockburn observed: 'In the eye of the law a blockade is effective if the enemy's ships are in such numbers and positions as to render running the blockade a matter of danger, although some vessels may succeed in getting through.'<sup>3</sup> And similarly in an American case decided by the Supreme Court during the Spanish-American War, 1898, it was declared that it was sufficient for legal effectiveness if the danger was real and apparent, that the test of efficiency is not the numbers of the blockading forces, and that one modern cruiser suffices in law, if it is in fact sufficient for the purpose and makes it dangerous for other craft to enter the blockaded port.<sup>4</sup> Riga, as has already been mentioned,<sup>5</sup> was effectively blockaded by one ship at a distance of 120 miles; and the development of mines and torpedoes, and the increased range of modern artillery, made and will make it necessary for blockading squadrons to place a considerable space between themselves and the blockaded port or coast. The Japanese in 1904 blockaded Port Arthur without approaching within many miles of the place; thereby adopting, apparently, the tactics of Lord Nelson, who always insisted that the blockading squadron ought not to be seen from the blockaded port.<sup>6</sup>

In *The Arthur* <sup>7</sup> Lord Stowell observed that the usual and regular mode of enforcing a blockade is 'by stationing a number of ships and forming as it were an arch of circumvallation round the prohibited part. If the arch fails in any one part, the blockade itself fails altogether'; but these words were applied to the circumstances of naval war in 1814, and in modern naval operations stress can hardly be laid on the necessity for anything like an arch of circumvallation. Nor have the prize courts of Great Britain and the United States insisted that the effectiveness of blockades shall be absolutely constant. An accidental interruption occasioned by violent

Interruption  
of blockade.

<sup>1</sup> *The Franciska* (1854), Spinks, 115.

<sup>2</sup> *Ibid.* at p. 118; *Naylor v. Taylor* (1829), 1 Moody & Malkin, 207.

<sup>3</sup> *Geipel v. Smith* (1872), L.R. 7 Q.B. 410.

<sup>4</sup> *The Olindo Rodrigues* (1898), 174 U.S. Rep. 510.

<sup>5</sup> See p. 368.

<sup>6</sup> Clarke and M'Arthur's *Life of Nelson*, vol. ii, p. 363; *Ann. Register* (1805), 233.

<sup>7</sup> (1814), 1 Dods. 423.

weather or fog has been treated as consistent with the continuance of a blockade;<sup>1</sup> nor is the blockade interrupted by the occasional success of a vessel in getting in or out,<sup>2</sup> or even by frequent successes of the kind, if they are due, as in the case of the blockade of Charleston during the American Civil War, to special circumstances, such as the peculiar nature of the coast.<sup>3</sup>

While the validity of a blockade is impaired by allowing a great number of neutral vessels to pass through in the first instance, it is not impaired by the action of a commander who, having made a number of captures, selects a certain number of flagrant cases and dismisses the rest on the ground of particular circumstances, such as that he cannot afford prize crews to man his captures.<sup>4</sup>

In *The Hoffnung*<sup>5</sup> Lord Stowell distinguished the case where a blockading squadron was driven off by a superior force: 'When a squadron is driven off by accidents of weather, which must have entered into the contemplation of the belligerent imposing the blockade, there is no reason to suppose that such a circumstance would create a change of system, since it could not be expected that any blockade would continue many months without being liable to such temporary interruptions. But when a squadron is driven off by the superior force, a new course of events arises. . . . In such a case the neutral merchant is not bound to foresee or to conjecture that the blockade will be resumed.' It may be added that it was the obvious object of the superior force to procure the raising of the blockade, an object which it has, *ex hypothesi*, succeeded in attaining.

Continental  
view.

Continental nations and jurists have, on the other hand, attempted from time to time to specify with more detail the conditions of 'effectiveness,' and to confine within narrower bounds the belligerent's right. Their standard was fairly expressed by Ortolan,<sup>6</sup> who refuses to recognise a blockade of a port unless 'toutes les passes ou avenues qui y conduisent sont tellement gardées par des forces navales permanentes que tout bâtiment qui chercherait à s'y introduire ne puisse le faire sans être aperçu et sans en être détourné.'

<sup>1</sup> *The Franciska* (1854), Spinks, 115.

<sup>2</sup> *The Frederick Molke* (1798), 1 C. Rob. 86; *The Columbia* (1799), 1 C. Rob. 154; *The Franciska* (1854), Spinks, at p. 124.

<sup>3</sup> Hall, 7th ed. p. 770.

<sup>4</sup> *The Rolla* (1807), 6 C. Rob. 364, 374.

<sup>5</sup> (1805), 6 C. Rob. at p. 117. See also *The Frederick Molke* (1798), 1 C. Rob. 87; *The Columbia* (1799), 1 C. Rob. 156.

<sup>6</sup> *Diplom. de la mer*, ii, 328.

In 1742 France and Denmark by treaty agreed that at least two vessels were essential, or a battery so placed on the coast that vessels could not get in without manifest danger;<sup>1</sup> Holland and the Sicilies in 1753 stipulated for at least six vessels, at a distance of little more than cannon shot from the blockaded port, or batteries so placed on the coast that entrance could not be effected without passing under the guns. The Armed Neutralities of 1780 and 1800 required the blockading ships to be stationary as well as adequate in force and sufficiently near, while a treaty between England and Russia in 1801 provided for the alternatives 'stationary *or* sufficiently near.'<sup>2</sup> Heffter, Calvo, Hautefeuille and Gessner all insisted on the requirement of stationary vessels guarding the immediate entrance to the port; Hautefeuille added that ships running in must be exposed to a cross fire; and he and Ortolan both contended that any accidental interruption put an end to the blockade. The French Naval Instructions of 1870 laid it down (when France was herself blockading) that 'a blockade is raised by any interruption whatever.'

The Declaration of Paris, by declining to define what is a 'sufficient force,' left the matter vague, and the Declaration of London carries the question no further. The requirement, however, that the blockading vessels be stationary may be regarded as now obsolete; and in the Memoranda which were drawn up by the various powers represented at the Conference of London, and presented to the Conference as setting out the views of the powers on the law, no power used the word 'arrêtés,' which was used by the Armed Neutralities. It is true that the Memorandum presented by the Netherlands defined effectiveness as 'maintenu par des forces suffisantes et stationnées de manière à pouvoir empêcher l'entrée dans et la sortie du rayon bloqué,' and in the Russian Memorandum occur the words: 'stationnées de manière à créer un danger réel.' But it hardly follows that 'stationariness' in the sense referred to by the Armed Neutralities and the continental jurists above mentioned is implied in the word 'stationnées.' The French Memorandum was silent on the point; and Austria-Hungary and Spain contented themselves with a general approval of the Italian statement that 'le blocus est effectif lorsqu'il est maintenu par des forces bloquantes, disposées de façon à pouvoir surveiller les accès du port et du littoral bloqué et apercevoir tout navire qui voudrait y aborder et étant en condition de pouvoir, le cas échéant, en

The Declaration of London.

<sup>1</sup> Woolsey, *International Law*, 5th ed. p. 353.

<sup>2</sup> Hall, p. 772.



empêcher effectivement l'entrée.' In a long explanation of the words 'area of operations' adopted by the Conference in the official Report, the requirement of stationariness was definitely abandoned, at any rate in the case of the blockade of a defended coast.<sup>1</sup>

Temporary  
absence.

On the question whether a blockade is raised by temporary absence, the extreme view of the continental jurists and of France in 1870 was abandoned for something more nearly approaching the British view:—

'A blockade is not regarded as raised if the blockading force is temporarily withdrawn on account of stress of weather' (Art. 4).

This, however, is, according to the Report of the Drafting Committee of the Conference, to be 'considered as limitative in the sense that stress of weather is the only form of compulsion which can be alleged': in other words, the doctrine 'expressio unius est exclusio alterius' is to apply, though it cannot be said to apply to other passages in the Declaration, which is by no means a complete code. In the passage quoted above from *The Franciska*<sup>2</sup> an exception was made in the case of 'fogs, violent winds and some necessary absences,'<sup>3</sup> and it has been suggested that a temporary withdrawal to chase a prize may be also an exception;<sup>4</sup> and the United States Code of Naval War (1900) excepts the case of a voluntary abandonment by the blockading force of its station carried out 'in the interest of the blockade.' One of the most important of such 'necessary absences' or absences 'in the interest of the blockade,' may be absence in pursuit of a prize, and it may probably be assumed that the proposed International Court would, in view of Art. 4, strictly construe any temporary absence, save such as is due to stress of weather, as invalidating the blockade and necessitating a fresh notification. Nor indeed does it seem unreasonable to insist that the blockading force must be large enough to enable it to pursue blockade-runners without leaving the blockaded port or coast open. Absences of the whole or the greater part of the force for reasons other than stress of weather will only occur when that force is very small; and blockades by one or two vessels, though possible,

<sup>1</sup> See p. 386, *infra*.

<sup>2</sup> See *supra*, pp. 370, 371.

<sup>3</sup> Cf. *The Frederick Molke* (1798), 1 C. Rob. 86; *The Columbia* (1799), 1 C. Rob. 154.

<sup>4</sup> Hall, 7th ed. p. 770.

are likely to be rare. Nor is a strict interpretation of Art. 4 likely to make much difference in the actual practice followed. Even the United States during the blockade of Galveston in 1863 realised the necessity of maintaining the blockade, and sent only an inferior vessel in pursuit of the *Alabama*, although only two years before she had refused to admit that the blockade of Charleston was at an end when, owing to the pursuit of a prize, the harbour had been open for five days.

With regard to temporary absence in the course of an engagement with an attacking force, there will probably be little difficulty. Such an absence is likely to be short, and if the blockading squadron is victorious, it can hardly be contended that an absence so essential to the maintenance of the blockade, and caused by a desire to maintain it, constitutes an abandonment.

A belligerent does not, as has been shown, lose his rights if some vessels, despite his vigilance, succeed in getting through; but he cannot concede to another belligerent, or to certain neutrals, or take for himself, the right to carry on commercial intercourse which he forbids to other neutrals.<sup>1</sup> This principle is recognised in the Declaration:—

Blockade must be impartial.

‘ A blockade must be applied impartially to the ships of all nations ’ (Art. 5).

To the strictness of the rule that all vessels must be admitted or none, there are two exceptions.

The first is permissive:—

‘ The commander of a blockading force may give permission to a warship to enter and subsequently to leave a blockaded port ’ (Art. 6).

A blockade is an act of war, affecting not only neutral subjects but neutral states,<sup>2</sup> and the admission of a neutral warship is an act of grace, and the object of laying down a rule upon the subject was merely to make it clear that the admission of neutral warships has no effect in invalidating a blockade.

The second exception was introduced on a suggestion

Vessel in distress.

<sup>1</sup> *The Rolla* (1807), 6 C. Rob. 364; *The Success* (1812), 1 Dods. 134; *The Franciska* (1854), 10 Moore, P.C.C. at p. 48.

<sup>2</sup> Hall, 7th ed. p. 767.

made by Germany, Italy, Japan and Russia on the ground of humanity:—

‘ In circumstances of distress, acknowledged by an officer of the blockading force, a neutral vessel may enter a place under blockade and subsequently leave it, provided that she has neither discharged nor shipped any cargo there ’ (Art. 7).

Distress being established and acknowledged, the vessel may enter as of right, unless the necessary assistance is provided by the blockading squadron,<sup>1</sup> it being the intention of the Conference to make it clear that entry into the blockaded port is not to be subject to the authorisation of the officer, but merely to his acknowledgment of a state of distress.<sup>2</sup> Circumstances of distress would include, for example, shortage of provisions or water, the leaking condition of the vessel, her need of immediate repairs, no other port being easy of access to make good the deficiency. That on proof of distress a vessel may enter is in accordance with a principle recognised by both American and English courts. In the case of *The Nuestra Señora de Regla*,<sup>3</sup> a Spanish vessel in distress, on her way from New York to Havannah, put into Port Royal, S.C. (then in rebellion and blockaded by a fleet of the United States) by leave of the admiral commanding the squadron, and was there seized and made use of by the Government of the United States. She was afterwards condemned as a prize; but the Supreme Court of the United States decided that she was not a lawful prize or subject to capture, and that her owners were entitled to a fair indemnity. In the case of *The Charlotta*,<sup>4</sup> the excuse of alleged distress was admitted after the delivery of an opinion of the Trinity Masters that the state of the wind and other circumstances made it impossible for the vessel to proceed to any other port than the blockaded one—the Texel. Lord Stowell used only to admit the want of water and provisions as an excuse for entering a blockaded port by a neutral where ‘ an uncontrollable necessity, which admits of no compromise, and cannot be resisted ’ could be satisfactorily explained to exist. The proof must be clear: in *The Hurtige Hane*,<sup>5</sup> a Danish vessel alleged the want of water and provisions as an excuse for going into Amsterdam, a blockaded

<sup>1</sup> Comment of Drafting Committee; also Cd. 4555, p. 175.

<sup>2</sup> Cd. 4555, p. 175.

<sup>3</sup> (1882), 17 Wall. 29.

<sup>4</sup> (1810), 1 Edw. 252.

<sup>5</sup> (1799), 2 C. Rob. 124; cf. *The Panaghia Rhomba* (1858), 12 Moore, P.C.C. 168.



port, and Lord Stowell refused to admit the excuse, observing that: 'It is usual to set up the want of water and provisions as an excuse, and if I were to admit pretences of this sort, a blockade would be nothing more than an idle ceremony.'<sup>1</sup>

By Art. 7 of the Declaration, the decision of the question, which is essentially one of fact, is left to the officer commanding the blockading force; and it is obvious that many difficulties of fact will arise on which he will have to come to a conclusion on scanty materials. Presumably he is entitled to look not only at the actuality but also at the *bona fides* of the distress; whether the distress was *bona fide* will depend in many instances on the quantity of stores with which the vessel started, her seaworthiness on starting, the length of her voyage, her destination, and the nature of her cargo, and to attempt to lay down any rules on the point would have been futile; while questions of a different nature are suggested by the proviso against the discharge or shipping of cargo. It will be noticed that the words of the proviso are in the past tense ('à la condition de n'y avoir laissé ni pris aucun chargement') and can therefore only be applicable to the egress of the vessel after she has been allowed to go in. When this is taken in conjunction with the explanation contained in the Report of the Drafting Committee, 'as soon as her distress is acknowledged by an authority of the blockading force, she may cross the line of blockade: it is not a favour which she has to ask of the humanity or courtesy of the blockading authority,' it seems that the blockading squadron, if distress is proved, cannot impose upon the neutral any express condition as to the discharging or shipping of cargo, or insist upon any security that such a condition, express or implied, will be observed. The belligerent has merely the right to catch the ship, if he can, when and if it comes out, and condemn it if any cargo is found to have been shipped or discharged. Apparently, therefore, the shipping or discharging of cargo after admission on the ground of distress is not to be regarded as a breach of faith, and it might in some cases, if the cargo were exceptionally valuable when sold in the blockaded port, be worth the neutral's while to allow the vessel to remain there till the raising of the blockade, and so escape all punishment. It is true that an undertaking of the kind suggested would in many cases be futile; as, however willing the neutral

<sup>1</sup> Cf. *The Diana* (1803), 7 Wall. 369; *The Panaghia Rhomba* (1858), 12 Moore, P.C. 168; *The Forest King* (1861), Blatchford, Prize Cases, 2; *The Major Barbour* (1862), *ibid.* 167.

master were to abide by it, he would be at the mercy of superior force if his cargo were of value to the blockaded port. But there seems some ground for suggesting that it would not have been unfair to subject the vessel and cargo in such circumstances to some penalty greater than that applicable to an ordinary attempt to break blockade outwards: to make her, for instance, liable to capture and confiscation till the end of her homeward voyage, or even after the raising of the blockade, in spite of the restriction upon the right of capture contained in Art. 20, which is dealt with hereafter. But the whole question is one of little importance, and can only occasionally arise.

Declaration  
of blockade.

It would clearly be unfair to neutrals that they should be subjected to the penalties of blockade-running until they are affected by sufficient notice of the existence of a blockade. As to the character of the notification necessary, there has existed in the past considerable divergence between the theory and practice of Great Britain, the United States, Germany and Denmark <sup>1</sup> on the one hand, and France, Italy, Spain and Sweden on the other.

A distinction must be made in the first place between 'declaration' and 'notification.' In the words of the Report of the Drafting Committee: 'The declaration of blockade is the act of the competent authority (a Government or commander of a squadron), stating that a blockade is, or is about to be established under conditions to be specified. The notification is the fact of bringing the declaration of blockade to the knowledge of the neutral powers or of certain authorities'; or, it should be added, of the individual neutral vessel in certain circumstances, as will be seen later.

This distinction is clearly drawn in Art. 8 of the Declaration of London:—

'A blockade, in order to be binding, must be declared in accordance with Art. 9, and notified in accordance with Arts. 11 and 16.'

As to the necessity for a declaration, and as to its requirements, there can hardly be dispute. A blockade is an act of sovereignty <sup>2</sup> and can only be imposed by a Government or a naval officer with the authority of his Government; but such authority will be presumed, if the circumstances are

<sup>1</sup> Hall, 7th ed. p. 761.

<sup>2</sup> *The Henrik and Maria* (1799), 1 C. Rob. 146, 148.

such that express instructions are impossible. In other words, a blockade is an act of sovereignty which may be delegated.<sup>1</sup> But approval and adoption by the Government is necessary, such adoption relating back to the date of the imposition of the blockade.<sup>2</sup> The courts have been strict, too, in insisting that a blockade must not be extended either by construction or on the mere authority of the blockading commander.<sup>3</sup> And the declaration must be strictly in accordance with the facts; otherwise the blockade is invalid and a new declaration is necessary.<sup>4</sup>

Further, by a long-established custom, neutral vessels in the blockaded port are allowed a certain time, which must depend upon the circumstances, but is usually fifteen days, in which to leave. In 1902, when Great Britain and Germany blockaded the Venezuelan ports, a fortnight was granted; in the Spanish-American War, 1898, the United States allowed thirty days in the case of the Cuban ports; in the Russo-Japanese War, 1904, the Japanese did not specify any days of grace in the declaration of blockade of Liao-Tong, but it appears that the circumstances were of an exceptional character.<sup>5</sup> In 1915 Great Britain allowed in her blockade of German East Africa four days, the Cameroons two days, the entrance to the Dardanelles and the coast of Asia Minor three days, the Bulgarian coast in the Ægean Sea two days.<sup>6</sup> If the vessels leave with cargo, such cargo must have been shipped before the commencement of the blockade. The United States apparently did not insist upon this limitation, as her Naval Code<sup>7</sup> required a statement, in the notification of blockade, of the time allowed to neutral vessels to unload, re-load and leave the port.

Days of  
grace.

These principles are embodied in the following Articles:—

‘ A declaration of blockade is made either by the blockading power or by the naval authorities acting in its name. It specifies—

- (1) The date when the blockade begins.
- (2) The geographical limits of the coast-line under blockade.

<sup>1</sup> *The Rolla* (1807), 6 C. Rob. 364, 366.

<sup>2</sup> *The Rolla* (*supra*); *The Franciska* (1854), Spinks, 111, at p. 114.

<sup>3</sup> *The Juffrow Maria* (1800), 3 C. Rob. p. 147; *The Henrik and Maria*, *supra*.

<sup>4</sup> *The Henrik and Maria*, *supra*; *The Franciska* (1854), Spinks, 111.

<sup>5</sup> Cf. Takahashi, pp. 373, 374.

<sup>6</sup> *Manual of Emergency Legislation*, Supplement iii, pp. 292-3, Supp. iv, p. 102; *London Gazette*, 1915, p. 10261.

<sup>7</sup> *Parl. Papers*, Misc. No. 5 (1909), Cd. 4555, p. 84.



(3) The period within which neutral vessels may come out (Art. 9).

' If the operations of the blockading power, or of the naval authorities acting in its name, do not tally with the particulars which, in accordance with Art. 9 (1) and (2), must be inserted in the declaration of blockade, the declaration is void, and a new declaration is necessary, in order to make the blockade operative ' (Art. 10).

For the case, not provided for in Art. 10, of neglect of Art. 9 (3), provision is made in Art. 16, as will be seen later. The blockade is not avoided, but the vessel coming out must be allowed to pass.

Notification:  
British view.

The question of notification has in the past presented more difficulties. What we may call the British view has always been that the notification or communication of the declaration of a blockade to neutral Governments constructively affects their subjects; and the latter are therefore not entitled to sail for the blockaded port on the chance that the blockade may have been suspended in the interval between their departure and their arrival. Further, knowledge, from whatsoever source derived, is sufficient to render the neutral liable, and in theory condemnation may be justified by the simple fact of notoriety, subject to this qualification that ' the notice to be inferred from general notoriety must be of such a character that if conveyed by distinct intimation from a competent authority it would have been binding.' <sup>1</sup>

The British view was stated by Lord Stowell in *The Columbia*: <sup>2</sup> ' But it has been said that by the American Treaty there must be a previous warning: certainly, where vessels sail without a knowledge of the blockade, a notice is necessary; but if you can affect them with the knowledge of that fact, a warning then becomes an idle ceremony, of no use, and therefore not to be required. The master, the consignees, and all persons intrusted with the management of the vessel, appear to have been sufficiently informed of the blockade, and therefore they are not in the situation which the treaty supposes. It is said also that the vessel had not arrived, that the offence was not actually committed, but rested in intention only. On this point I am clearly of opinion that the sailing with an intention of evading the blockade . . .

<sup>1</sup> *The Franciska* (1854), 10 Moore, P.C.C. p. 58.

<sup>2</sup> (1799), 1 C. Rob. at p. 156.

was a beginning to execute that intention, and is to be taken as an overt act constituting the offence. From that moment the blockade is fraudulently evaded.'

In *The Neptunus*<sup>1</sup> Lord Stowell laid it down that in no circumstances could a neutral individual be heard to plead ignorance of a blockade previously notified to his Government. He pointed out that 'it would be the most nugatory thing in the world if individuals were allowed to plead their ignorance of it: it is the duty of foreign Governments to communicate the information to their subjects, whose interests they are bound to protect.' 'I shall hold therefore,' he continued, 'that a neutral master can never be heard to aver against a notification of blockade that he is ignorant of it. If he is really ignorant of it, it may be a subject of representation to his own Government, and it may raise a claim of compensation from them, but it can be no plea in the court of a belligerent.'

The American view was stated in the judgment which Chase, C.J., delivered on behalf of the court in *The Circassian*:<sup>2</sup> 'It is a well-established principle of prize law, as administered by the courts both of the United States and Great Britain, that sailing from a neutral port with intent to enter a blockaded port, and with knowledge of the existence of the blockade, subjects the vessel and, in most cases, its cargo, to capture and condemnation. We are entirely satisfied with this rule. It was established with some hesitation when sailing vessels were the only vehicles of the ocean commerce; but now, when steam and electricity have made all nations neighbours, and blockade-running from neutral ports seems to have been organised as a business, and almost raised to a profession, it is clearly seen to be indispensable to the efficient exercise of belligerent rights.'

There has been some doubt as to the United States doctrine;<sup>3</sup> and several treaties, to which that country was a party, and even one so late as 1871 (with Italy), provide for notification to a vessel on her voyage; yet the above principle was followed by the United States courts during the Civil War;<sup>4</sup> and German and Danish practice is in accordance with that of Great Britain and the United States.

Two mitigations of the British and American practice may be mentioned. In the first place, vessels entering a place under

Ignorance of  
blockade.

American  
view.

<sup>1</sup> (1799), 2 C. Rob. 111, 112.

<sup>2</sup> (1864), 2 Wall. at pp. 151, 152.

<sup>3</sup> Atherley-Jones, *Commerce in War*, p. 105.

<sup>4</sup> e.g. *The Peterhoff* (1866), 5 Wall. 28.

Mitigations.

blockade *de facto* only, or clearing from a home port before the public notification, are entitled to a particular warning or 'notification spéciale';<sup>1</sup> in the second place, where the port of clearance is very remote, 'lying at such a distance where they cannot have constant information of the state of the blockade, whether it continues or is relaxed, it is not unnatural that they should send their ship conjecturally, upon the expectation of finding the blockade broken.'<sup>2</sup> But as Lord Stowell added, and for obvious reasons, 'this inquiry should be made, not in the very mouth of the river or estuary from the blockading vessels, but in the ports that lie in the way, and which can furnish information without furnishing opportunities for fraud.'

Notification:  
continental  
view.

The practice of France, Italy and Spain has in the past been more indulgent to neutrals. According to it, the essential notification in every case was the 'notification spéciale,' given on the spot to the neutral trader by a vessel of the blockading squadron.<sup>3</sup> It had, it is true, become customary for France to notify blockades to neutral Governments, but such notification was not held to affect the individual subjects of those Governments, or to enable the belligerent to seize a vessel which had not been first notified on the spot. The distinction to be found in the British practice between *de facto* blockade, which required special notification,<sup>4</sup> and a diplomatically notified blockade, which did not, was thus in the French practice non-existent.

In the French Memorandum<sup>5</sup> laid before the Conference at London, it was still claimed that a ship sailing towards a blockaded port is not to be regarded as affected with knowledge, unless the notification has been entered in her papers by a vessel belonging to the blockading squadron (and a similar position was taken up by Italy<sup>6</sup>); but this attitude was abandoned by France<sup>7</sup> after a study of the Memoranda of the various powers, on the ground that it was not a practice generally followed; that the reasons which justified it had gradually disappeared with the development of means of communication; and that the precautions taken to insure that a blockade shall be effective, and that its limits should be known, made the old French rule no longer necessary.

The Declara-  
tion of  
London.

The way was thus cleared for the adoption of Articles on which there was a general agreement. By Art. 8, it had been

<sup>1</sup> *The Vrouw Judith* (1799), 1 C. Rob. 150, at p. 152.

<sup>2</sup> *The Betsey* (1799), 1 C. Rob. at p. 334.

<sup>3</sup> Hall, 7th ed. p. 762; Woolsey, *International Law*, 5th ed. p. 355.

<sup>4</sup> *The Mercurius* (1799), 1 C. Rob. pp. 80, 83, and see *supra*.

<sup>5</sup> *Misc. No. 5* (1909), Cd. 4555, p. 88.

<sup>6</sup> *Ibid.* p. 89.

<sup>7</sup> *Ibid.* p. 161.



provided that in order to be binding, a blockade must be notified in accordance with Arts. 11 and 16. It was provided that:—

‘ A declaration of blockade is notified—

‘ (1) To neutral powers by the blockading power, by means of a communication addressed to the Governments direct or to their representatives accredited to it:

‘ (2) To the local authorities by the officer commanding the blockading force. The local authorities will, in turn, inform the foreign consular officers at the port, or on the coast-line under blockade, as soon as possible ’ (Art. 11).

‘ The rules as to declaration and notification of blockade apply to cases where the limits of a blockade are extended, or where a blockade is re-established after having been raised ’ (Art. 12).

‘ The voluntary raising of a blockade, as also any restriction in the limits of a blockade, must be notified in the manner prescribed by Art. 11 ’ (Art. 13).

‘ The liability of a neutral vessel to capture for breach of blockade is contingent on her knowledge, actual or presumptive, of the blockade ’ (Art. 14).

‘ Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port subsequently to the notification of the blockade to the power to which such port belongs, provided that such notification was made in sufficient time ’ (Art. 15).

‘ If a vessel approaching a blockaded port has no knowledge, actual or presumptive, of the blockade, the notification must be made to the vessel itself by an officer of one of the ships of the blockading force. This notification should be entered in the vessel’s log-book, and must state the day and hour and the geographical position of the vessel at the time. If, through the negligence of the officer commanding the blockading force, no declaration of blockade has been notified to the local authorities, or if, in the declaration, as notified, no period has been mentioned within which neutral vessels may come out, a neutral vessel coming out of the blockaded port must be allowed to pass free ’ (Art. 16).

Stress is thus laid primarily upon a proper declaration and

a proper notification of that declaration, and the declaration and notification are distinguished as two separate things, though in practice the distinction does not appear to amount to very much, as the declaration, until made to the persons affected, or, in other words, notified, has no operative effect, so far as neutrals are concerned.

**Knowledge.**

The distinction between a diplomatically notified and a *de facto* blockade is recognised, as, by the joint effect of Arts. 8, 11 and 16, a blockade is binding if notified by a communication to neutral Governments and local authorities, and also if notified on the spot to a vessel which has no actual or presumptive knowledge of its existence. Knowledge is presumed (Art. 15) if the vessel left a neutral port subsequently to the diplomatic notification, if such notification was made in sufficient time; knowledge is, of course, actual if the vessel has been previously stopped and duly warned.

The rule that knowledge is presumed if the vessel sailed subsequently to and a sufficient length of time after diplomatic notification is in accordance with the British practice, as illustrated in the cases of *The Neptunus*<sup>1</sup> and *The Jonge Petronella*,<sup>2</sup> but no provision is made for the British principle, that knowledge is presumed even of an unnotified blockade, by reason of its general notoriety at the place from which the vessel last sailed.<sup>3</sup> Indeed, this principle is implicitly negatived by the provisions as to notification contained in Art. 8; and in view of the development of the means of communication, and the inherent difficulties of applying the principle, with the necessary qualification that the notice to be inferred from notoriety must be such that if conveyed by a distinct intimation it would be binding,<sup>4</sup> the disappearance of this rule will probably in practice make little difference.<sup>5</sup>

The custom of allowing neutral vessels time to leave is

<sup>1</sup> (1799), 2 C. Rob. 110.

<sup>2</sup> (1799), 2 C. Rob. 131. In this case the vessel was released because it had sailed only one week after notification, which seems a lenient view.

<sup>3</sup> *The Adelaide Rose* (1799), 2 C. Rob. 111*n*. *The Union* (1855), Spinks, 164.

<sup>4</sup> *The Franciska* (1854), 10 Moore, P.C.C. 58.

<sup>5</sup> Soon after the outbreak of the Great War, an Order in Council was issued (August 20, 1914)—which was followed by a French decree (August 25, 1914)—adding the following provisions as to presumption of knowledge: 'The existence of a blockade shall be presumed to be known (a) to all ships which sailed from or touched at an enemy port a sufficient time after the notification of the blockade to the local authorities to have enabled the enemy Government to make known the existence of the blockade, (b) to all ships which sailed from or touched at a British or allied port after the publication of the declaration of blockade' (*Manual of Emergency Legislation*, 1914, p. 144). This provision, however, was cancelled by the Order in Council of Oct. 29, 1914.

now made obligatory, it being understood that the time allowed is to be reasonable;<sup>1</sup> but this, of course, only applies to vessels in the port at the time of the institution of the blockade. It is the duty of the officer commanding the blockading squadron to notify the blockade to the authorities of the blockaded port (Art. 11 (2)); if he by negligence fails to do so, or fails to specify the period within which vessels may come out, he must allow neutral vessels to pass out (Art. 16). But if there was no negligence on his part, and it was impossible to notify the local authorities, owing to the fact that they had intercepted all communications,<sup>2</sup> then it seems that a neutral vessel without knowledge, actual or presumptive, of the blockade need not be allowed to pass. It may not, apparently, be captured, but it must be specially notified and turned back. Such a vessel is in a worse position, therefore, than a vessel similarly ignorant, which attempts to pass through from outside; and on this account it is probable that the duty of the commander to notify the local authorities will be strictly construed, and he will be required to prove that the local authorities, and not merely the state of the weather or the distance of the blockading squadron, were to blame.

It is to be noted that, in Art. 15, the words 'neutral port' are used. It may, however, probably be taken for granted that a neutral vessel leaving an enemy port, or a port of the blockading belligerent, is *a fortiori* presumed to be affected with notice; and it was considered superfluous to require a notice by the blockading power to its enemy, or to those, whether subjects or neutrals, in its own territories. But if, in fact, the neutral vessel can prove that it left a port of the blockading belligerent before any notice of the blockade had reached that port, it should be in no worse position than if it had left a neutral port in similar circumstances. Obviously the blockading belligerent cannot rely on a notice which it had not yet made public in its own territories; but it cannot be blamed for similar neglect on the part of the enemy.

The difference in practice as to the notice necessary was accompanied by a similar difference as to the time when and the place where the offence of breaking blockade was committed and the neutral vessel could be seized. It followed from the French doctrine as to notice that the vessel could not be

Neutral  
vessel  
leaving  
enemy port.

Limits of  
liability to  
seizure.

<sup>1</sup> Report of Drafting Committee on Arts. 9 and 16.

<sup>2</sup> *Ibid.* Art. 16.



liable until it reached the line of the blockade; <sup>1</sup> and from the British doctrine that the act of sailing with the intention of getting through to the blockaded port constituted the offence, <sup>2</sup> a rule which was, however, relaxed in special circumstances, <sup>3</sup> while in practice 'an attentive examination of all the reported cases in the British Prize Courts relative to questions of blockade has shown that, while the principle of liability to seizure at any point of a voyage to or from a blockaded port or coast has been maintained in theory, there is, in fact, no such case in which a vessel has been condemned for breach of blockade except when actually close to, or directly approaching, the blockaded port or coast.' <sup>4</sup>

Little alteration, therefore, was made by Art. 17:—

'Neutral vessels may not be captured for breach of blockade except within the area of operations (*rayon d'action*) of the warships detailed to render the blockade effective.'

#### Area of operations.

The 'area of operations' was explained, and, so far as possible, defined, in a statement submitted on behalf of the French Government, officially adopted by the Conference as a commentary upon Art. 17 and incorporated in the official Report:—

'When a Government decides to undertake blockading operations against some part of the enemy coast, it details a certain number of warships to take part in the blockade, and intrusts the command to an officer, whose duty is to use them for the purpose of making the blockade effective. The commander of the naval force thus formed posts the ships at his disposal according to the line of the coast and the geographical position of the blockaded places, and instructs each ship as to the part which she has to play, and especially as to the zone which she is to watch. All the zones watched, taken together, and so organised as to make the blockade effective, form the area of operations of the blockading naval force.

'The area of operations so constituted is intimately connected with the effectiveness of the blockade, and also with the number of ships employed on it.

'Cases may occur in which a single ship will be enough to

<sup>1</sup> Woolsey, *International Law*, 5th ed. p. 359.

<sup>2</sup> Lawrence, *Principles*, 4th ed. p. 692.

<sup>3</sup> *The Betsey* (1799), 1 C. Rob. at p. 332.

<sup>4</sup> Instructions to British Delegates at the Conference of London, *Parl. Papers*, Misc. No. 4 (1909).

keep a blockade effective—for instance, at the entrance of a port, or at the mouth of a river with a small estuary, so long as circumstances allow the blockading ship to stay near enough to the entrance. In that case the area of operations is itself near the coast. But, on the other hand, if circumstances force her to remain far off, one ship may not be enough to secure effectiveness, and to maintain this she will then have to be supported by others. From this cause the area of operations becomes wider and extends further from the coast. It may, therefore, vary with circumstances, and with the number of blockading ships, but it will always be limited by the condition that effectiveness must be assured.

‘ It does not seem possible to fix the limits of the area of operations in definite figures,<sup>1</sup> any more than to fix beforehand and definitely the number of ships necessary to assure the effectiveness of any blockade. These points must be settled according to circumstances in each particular case of a blockade. This might perhaps be done at the time of making the declaration.

‘ It is clear that a blockade will not be established in the same way on a defenceless coast as on one possessing all modern means of defence. In the latter case there could be no question of enforcing a rule such as that which formerly required that ships should be stationary and sufficiently close to the blockaded places; the position would be too dangerous for the ships of the blockading force which, besides, now possess more powerful means of watching effectively a much wider zone than formerly.

‘ The area of operations of a blockading naval force may be rather wide, but as it depends on the number of ships contributing to the effectiveness of the blockade, and is always limited by the condition that it should be effective, it will never reach distant seas where merchant vessels sail, which are, perhaps, making for the blockaded ports, but whose destination is contingent on the changes which circumstances may produce in the blockade during their voyage. To sum up, the idea of the area of operations, joined with that of effectiveness, as we have tried to define it, that is to say, including the zone of operations of the blockading force, allows the belligerent effectively to exercise the right of blockade which he admittedly possesses, and, on the other hand, saves neutrals from exposure to the drawbacks of blockade at a great distance, while it leaves them free to run the risk which they knowingly

<sup>1</sup> As had been suggested by Japan (Cd. 4555, p. 162).

incur by approaching points to which access is forbidden by the belligerent.'

Termination  
of the  
offence.

By the decisions of the British courts, a vessel breaking blockade outwards was, in theory, liable to capture until the conclusion of her homeward voyage,<sup>1</sup> and by a ship not forming part of the blockading force.<sup>2</sup> In the words of Sir W. Scott in *The Welvaart van Pillaw*:<sup>3</sup> 'If the principle is sound that a neutral vessel is not permitted to come out of a blockaded port with a cargo, I know no other natural termination of the offence but the end of that voyage. It would be ridiculous to say, if you can but get past the blockading force you are free.'

On this point the French doctrine was thought by Hall<sup>4</sup> to be in accord with that of Great Britain and the United States; but in the French Memorandum submitted to the Conference<sup>5</sup> the rule was laid down that ships breaking blockade could only be seized within the area of operations of the blockading force, and that a ship which has crossed the line of blockade is liable to capture so long, but only so long, as it is pursued.

At the Conference the British view was not insisted upon, the Government being of the opinion (on the ground that in practice vessels had never been captured at a great distance) 'that the acceptance of the latter (*i.e.* the French) view, would not be likely to inflict any material injury on the interests of Great Britain.'

Art. 17, already set out, would appear in itself to make it no longer possible for a vessel which has broken blockade outwards to be captured at a distance from the area of operations by a vessel not forming a part of the blockading squadron; but the case of the breach of blockade outwards was specifically dealt with, and provision was made for the case of pursuit, by Art. 20:—

'A vessel which has broken blockade outwards, or which has attempted to break blockade inwards, is liable to capture so long as she is pursued by a ship of the

<sup>1</sup> *The Welvaart van Pillaw* (1799), 2 C. Rob. 128: in this case the vessel broke the blockade of Amsterdam outwards, and was captured off Dungeness. *The General Hamilton* (1805), 6 C. Rob. 61: in this case the vessel had broken blockade outwards from the Seine, and was driven into a British port where she was captured.

<sup>2</sup> *The Juffrow Maria Schroeder* (1801), 3 C. Rob. 147, 153.

<sup>3</sup> (1799), 2 C. Rob. 128.

<sup>4</sup> Hall, 7th ed. p. 779.

<sup>5</sup> *Misc. No. 5* (1909), Cd. 4555, p. 30.



blockading force. If the pursuit is abandoned, or if the blockade is raised, her capture can no longer be effected.'

The Report adds by way of commentary: 'This vessel must remain liable to capture so long as she is pursued by a ship of the blockading force; and it would not suffice that she be encountered by a cruiser of the blockading enemy which did not belong to the blockading squadron. The question whether or not the pursuit is abandoned is a question of fact; it does not suffice that the vessel should take refuge in a neutral port. The ship which is pursuing her can wait till she leaves it, so that the pursuit is necessarily suspended, but not abandoned.'

When a blockade is ended, it can only be resumed on observ-  
ance of all the formalities of a fresh blockade. A blockade, as  
has been stated,<sup>1</sup> is not ended by the temporary withdrawal of  
the blockading force, owing to stress of weather, nor by the  
occasional success of blockade-runners. It is ended when the  
war ends, when the blockading squadron is driven off by a  
superior force,<sup>2</sup> or is withdrawn for some other service, or if it  
is declared to have been raised, or—according to the British  
practice—if the blockading power occupies the blockaded terri-  
tory<sup>3</sup> (though in *The Circassian*<sup>4</sup> this doctrine was disputed  
by the United States courts, till re-enunciated by the Mixed  
Commission under Article XII of the Treaty of Washington),<sup>5</sup>  
or if for any reason the blockade is not effectively maintained,  
or impartially enforced.<sup>6</sup> Where the blockading power occupies  
the blockaded territory, the blockade will nevertheless be  
deemed to exist if the occupation is only partial. Thus, in the  
Spanish-American War, the *Adula*,<sup>7</sup> a British vessel, was con-  
demned by the United States Supreme Court for attempting  
to enter the blockaded Cuban port of Guantanamo, which,  
though it had been seized by the American forces, was still in  
the possession of the Spanish troops.

Termination  
of blockade.

It was urged by the United States in 1861<sup>8</sup> that a notified  
blockade continued till notification of its termination; but  
the claim cannot be put higher than this, that a notified

<sup>1</sup> *Supra*, p. 374.

<sup>2</sup> *The Hoffnung* (1805), 6 C. Rob. 112, 117. *The Triheten* (1805), 6 C. Rob. 65, 67.

<sup>3</sup> Lawrence, *Principles*, p. 689. <sup>4</sup> (1864), 2 Wall. 135.

<sup>5</sup> Moore, *International Arbitrations*, vol. iv, p. 3911.

<sup>6</sup> *The Hoffnung*, *supra*; *The Franciska* (1854), 10 Moore, P.C.C. 37.

<sup>7</sup> *The Adula* (1899), 176 U.S. Rep. 361.

<sup>8</sup> Hall, 7th ed. pp. 773-774.

blockade is presumed to continue, and if it has ended it lies upon the neutral vessel to prove that fact.

On this question of the termination of a blockade, the Conference contented itself with requiring, by Art. 13, formal notification of the voluntary raising or restriction of a blockade. As is pointed out,<sup>1</sup> there cannot be any penalty for failure to make such notification, as there is in the case of failure to notify the establishment of a blockade. Little more than diplomatic remonstrances could follow; but what was previously regarded as an act of courtesy to be expected of the belligerent is now raised to the level of an international duty. If, however, the area of a blockade is restricted, and, ports A and B having been blockaded, the blockade of A is raised and that of B alone continued, then it would seem to follow that the failure to notify the raising of the blockade of A will invalidate the blockade of B.

#### Penalty.

The penalty for breach of blockade is confiscation of the ship. By the British rule the cargo will be confiscated if it belongs to the same owner as the ship, or the consignees of the cargo have such control of the ship as to constitute the master their agent;<sup>2</sup> if it belongs to a different owner it will be confiscated if at the time of shipment he knew, or might have known, of the blockade.<sup>3</sup> As a general rule, the master is not treated as the agent of the owner of the cargo in the same way as he is treated as the agent of the owner of the ship;<sup>4</sup> but in certain cases his acts may by inference bind the owner of the cargo, as, for instance, if he deviates to a port which, before the ship sailed, was known to be blockaded,<sup>5</sup> or gives a frivolous excuse for his deviation to a blockaded port.<sup>6</sup>

Art. 21 of the Declaration confirms the broad principle on which the British courts had acted:—

‘A vessel found guilty of breach of blockade is liable to condemnation. The cargo is also condemned, unless it is proved that at the time of the shipment of the goods the shipper neither knew, nor could have known, of the intention to break the blockade.’

<sup>1</sup> Report of Drafting Committee, on Art. 13.

<sup>2</sup> *The Columbia* (1799), 1 C. Rob. 154; and cf. *The Imina* (1800), 3 C. Rob. 169; *The Rosalie and Betty* (1800), 2 C. Rob. 343, 351.

<sup>3</sup> *The Panaghia Rhomba* (1858), 12 Moore, P.C. 168.

<sup>4</sup> *The Adonis* (1804), 5 C. Rob. 256, 261.

<sup>5</sup> *The Adonis* (1804), 5 C. Rob. 258; *The Marianna Flora* (1826), 7 Wheaton, 57; *The Alexander* (1801), 4 C. Rob. 93; *The Panaghia Rhomba* (1858), 12 Moore, P.C. 180.

<sup>6</sup> *The Alexander*, *supra*.

The doctrine of continuous voyage has been fully dealt with in its relation to contraband. By a supposed analogy with this doctrine, the American courts condemned vessels for breach of blockade when they were on their way to a neutral port, on the suspicion that their ultimate destination was a blockaded port,<sup>1</sup> holding that a voyage from a neutral to a belligerent port is one and the same voyage, whether the destination be ulterior or direct, and whether with or without the interposition of one or more intermediate ports, and whether to be performed by one vessel or several employed in the same transaction and in the accomplishment of the same purpose.

This, as has been pointed out,<sup>2</sup> was not really an application of the doctrine of continuous voyage, but a dangerous relaxation of the rules of evidence. By the old rule laid down by the British and American courts, if it was proved that a vessel sailed with a destination to a blockaded port, she was liable to capture at any time after she had started, and it would make no difference that she was going first to a neutral port; the American innovation was the seizure of vessels without the proper evidence of an intention to enter the blockaded port, and even, as in the case of *The Stephen Hart*<sup>3</sup> and *The Springbok*,<sup>4</sup> on evidence that the cargo was to be unshipped at the neutral port and conveyed to the blockaded port by other means. The principles of these decisions have been severely criticised,<sup>5</sup> and they were an extension of the rule as laid down in the British Manual of Naval Prize Law of 1888, that when a vessel is ostensibly bound for 'a neutral or unblockaded enemy port, while she is in reality intended after touching there to go on to a blockaded port . . . her destination is held to be for the blockaded port from the time of sailing.'

With Art. 17 restricting capture to the area of operations of the blockading force, the possibility of the question arising would practically disappear if the Declaration became binding; and the point was further dealt with in Art. 19:—

'Whatever may be the ulterior destination of a vessel or of her cargo, she cannot be captured for breach of blockade if at the moment she is on her way to a non-blockaded port.'

<sup>1</sup> *The Circassian* (1864), 2 Wall. 135; *The Bermuda* (1865), 3 Wall. 515.

<sup>2</sup> Atherley-Jones, *Commerce in War*, p. 255.

<sup>3</sup> (1863), 3 Wall. 559.

<sup>4</sup> (1866), 5 Wall. 1.

<sup>5</sup> See Wheaton (ed. Phillipson), p. 744, and the references there given in note (p).



This does not, of course, shut out proof that the destination to a non-blockaded port is only an ostensible one, and that the blockaded port is the immediate destination. As the Report says: 'It is the true destination of the vessel which must be considered when a breach of blockade is in question, and not the ulterior destination of the cargo. Proof or presumption of the latter is therefore not enough to justify the capture, for violation of a blockade, of a ship actually bound for an unblockaded port. But the cruiser might always prove that this destination to an unblockaded port is only apparent, and that in reality the immediate destination of the vessel is the blockaded port.'<sup>1</sup>

Blockade in  
the Great  
War.

We have already referred to the necessity in which Great Britain found herself to close the North Sea as a military area (November 2, 1914), owing to the German lawless methods of warfare, especially in regard to indiscriminate mine-laying.<sup>2</sup> On February 4, 1915, Germany retaliated by declaring that all the waters surrounding Great Britain, including the whole of the English Channel, were to be regarded as a zone of war, and intimated that neutral shipping would be there exposed to danger. This measure was probably intended to give Germany the benefits of a blockade without imposing on her the obligations and responsibilities it entails. In reality it was not a blockade either *de jure* or *de facto*; at most it amounted to a 'paper' blockade, inasmuch as no adequate naval forces were stationed off the British coasts to make it effective. In these circumstances the British Government was compelled to adopt retaliatory measures against German commerce; and on March 11, 1915, an Order in Council was issued prescribing a number of restrictions.<sup>3</sup> The term 'blockade' was not mentioned, but virtually a blockade of Germany was thereby established, subject to certain relaxations—*e.g.* ships and cargo would not be confiscated (a liability consequent on breach of blockade). In a note, however, to the United States, March 13, Sir Edward Grey used the word 'blockade.' The word 'blockade' was mentioned, too, by Mr. A. J. Balfour, when he said that in consequence of the threat of the Germans to sink 'every merchant ship which they believe to be British, without regard to life, without regard to the ownership of the cargo, without any assurance that the vessel is not neutral,

<sup>1</sup> By an Order in Council, July 7, 1916, the principle of continuous voyage or ultimate destination was applied to blockade.

<sup>2</sup> See *supra*, p. 225.

<sup>3</sup> See Phillipson, *Int. Law and the Great War*, pp. 387-390. See also the more recent Reprisals Order, Jan. 10, 1917 (Stat. R. & O. 1917, No. 6).

and without even the pretence of legal investigation,' the Allies were compelled to retaliate 'by enforcing a blockade designed to prevent all foreign goods from entering Germany and all German goods from going abroad.'<sup>1</sup>

The American Secretary of State held (March 5, 1915) that the proposed course of action is 'unknown to international law,' and described it as 'paradoxical,' as neutrals were left in doubt as to the treatment to be accorded to them.<sup>2</sup> 'The Government of the United States,' he said in a note of March 30, 1915, 'is of course not oblivious to the great changes which have occurred in the conditions and means of naval warfare since the rules hitherto governing legal blockade were formulated. It might be ready to admit that the old form of "close" blockade with its cordon of ships in the immediate offing of the blockaded ports is no longer practicable in face of an enemy possessing the means and opportunity to make an effective defence by the use of submarines, mines and air craft; but it can hardly be maintained that, whatever form of effective blockade may be made use of, it is impossible to conform at least to the spirit and principles of the established rules of war. If the necessities of the case should seem to render it imperative that the cordon of blockading vessels be extended across the approaches to any neighbouring neutral port or country, it would seem clear that it would still be easily practicable to comply with the well-recognised and reasonable prohibition of international law against the blockading of neutral ports by according free admission and exit to all lawful traffic with neutral ports through the blockading cordon. This traffic would of course include all outward-bound traffic from the neutral country and all inward-bound traffic to the neutral country except contraband in transit to the enemy. Such procedure need not conflict in any respect with the rights of the belligerent maintaining the blockade, since the right would remain with the blockading vessels to visit and search all ships either entering or leaving the neutral territory which they were in fact, but not of right, investing.'<sup>3</sup> As to the British plea of the necessity for retaliation, the Secretary of State thought that the illegitimate conduct of Germany did not justify proceedings of Great Britain which affected neutrals and which were contrary to international law; but Sir Edward Grey replied that the measures taken were unavoidable, that

<sup>1</sup> *The Times*, April 2, 1915. E.g. goods going through Holland and Denmark were stopped.

<sup>2</sup> *Amer. Journ. of Int. Law, Supp.* July, 1915, p. 103.

<sup>3</sup> *Ibid.* p. 119.

compensation would be paid to neutrals for hardships inflicted, and that their claims would be considered with the utmost dispatch. Various concessions were afterwards made to citizens of the United States. In the formal reply of July 24, 1915, the American contentions were fully examined;<sup>1</sup> the British Government declined to admit that a belligerent infringes any principle of international law by establishing a blockade in such a way as to cut off the enemy's commerce with foreign countries through neutral ports, if the circumstances render such an application of the principles of blockade the only means of making it effective. Reference was made to the extension of the old principles by the United States Government during the Civil War in order to enforce the blockade of the Southern States; and the difficulties of the Allies in the present case were somewhat similar: 'Adjacent to Germany are various neutral countries which afford her convenient opportunities for carrying on her trade with foreign countries. Her own territories are covered by a network of railways and waterways, which enable her commerce to pass as conveniently through ports in such neutral countries as through her own. A blockade limited to enemy ports would leave open routes by which every kind of German commerce could pass almost as easily as through the ports in her own territory. Rotterdam is indeed the nearest outlet for some of the industrial districts of Germany.'

In many quarters in the United States it was admitted that the British note contained a fair and adequate justification. On October 21, 1915, however, the Department of State addressed another communication<sup>2</sup> to His Majesty's Government, again attacking the blockade as illegal, because it was not applied impartially to the ships of all nations—the German ports being open to traffic with Norway, Sweden and Denmark—and because it barred access to neutral ports contrary to the Declaration of London.<sup>3</sup>

However this may be, the American Government admitted in its note of March 30, 1915, that the old form of blockade was not applicable in modern conditions, especially in view of the use of submarines, mines and aircraft. We may accordingly conclude in the words of a recent American writer: 'The long range blockade must therefore be recognised as valid,

<sup>1</sup> *Amer. Journ. of Int. Law, Supp.* July, 1915, p. 158.

<sup>2</sup> *Ibid.* Oct. 1916, pp. 73 seq.

<sup>3</sup> *Ibid.* pp. 80, 81.



and blockading craft must be permitted to remain so far out as to be beyond the range of torpedo boats or mines, which means that they may be so completely out of sight of the blockaded port as to render ingress and egress no longer dangerous. If this is not recognised as an effective blockade, blockade under modern conditions is now impossible.' <sup>1</sup>

<sup>1</sup> *Amer. Journ. of Int. Law*, vol. ix (1915), p. 847; cf. an article by J. S. Corbett in *Nineteenth Century and After*, vol. lxi, p. 926.

## CHAPTER VI

### UNNEUTRAL SERVICE

UNDER this heading—'assistance hostile' being the expression in the French text—the Conference of London dealt with the carriage by neutrals of enemy passengers of a naval or military character, or enemy dispatches, and with the direct participation of a neutral vessel in the service of a belligerent. This branch of the law is sometimes treated under the heading 'Analogues of Contraband'; and the principle on which the prohibition of contraband rests is no doubt similar in its general character, but the analogy in its practical application is not very close. The destination of a noxious dispatch or of noxious persons, for instance, may be a neutral port; and in carrying dispatches or persons a neutral may have specially hired himself for the service, in which case he is more closely associated with the belligerent than a dealer in contraband, who merely seeks his best market; or he may be simply carrying them in the ordinary course of his business as a carrier of mails or passengers, in which case his association is far less close.

It may be mentioned here that in an action on a policy insurance arising out of the *Nigretia*, a British vessel that was captured by the Japanese in 1904 for carrying two disguised Russian officers with the connivance of the charterers, it was held that enemy military persons carried by a neutral vessel are not contraband of war in the proper sense of the term.<sup>1</sup>

Carriage of  
dispatches.

The case of dispatch carrying presents few difficulties and may be shortly dealt with. To adapt the language of Lord Justice Bowen in a well-known English case,<sup>2</sup> a dispatch is not like a fire; a neutral may carry it about without being bound to suppose that it is likely to do an injury. The general principle, therefore, is that neutral vessels are prohibited from carrying, or carry at their peril, only those dispatches of which they knew, or ought to have known, the military or naval character. Such knowledge will be presumed, therefore, if

<sup>1</sup> *Yangtze Insurance Association v. The Indemnity Marine Mutual Assurance Co.* (1908), 1 K.B. 910; 2 K.B. 504. See *infra*, p. 400. Cf. *The Trent* (1861), *infra*, p. 404.

<sup>2</sup> *Emmens v. Pottle* (1885), 16 Q.B.D. at p. 358.

they are addressed to persons in the military or naval service, or to agents in a neutral state other than the accredited agents who would make peaceful communications in the ordinary course; but save in such and similar cases the presumption cannot arise.<sup>1</sup>

In *The Atalanta*,<sup>2</sup> Lord Stowell condemned a ship bound for Bremen, which had touched at the Isle of France, a French colony, and taken on board a French officer and dispatches from the governor to the Minister of Marine at Paris. The case was aggravated by an attempt to conceal the documents. The learned judge intimated his view of the gravity of the offence in the following passage: <sup>3</sup> 'How is the intercourse between the mother-country and the colonies kept up in time of peace? By ships of war or by packets on the service of the state. If a war intervenes, and the other belligerent prevails to interrupt that communication, any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensible neutral character, does in fact place himself in the service of the enemy state. . . . Nor let it be supposed that it is an act of light and casual importance. . . . In the transmission of dispatches may be conveyed the entire plan of campaign, that may defeat all the projects of the other belligerent in that quarter of the world. . . . It is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences in the operations of the enemy.'

In *The Caroline* <sup>4</sup> the dispatches were being carried from the ambassador of the enemy's state resident in the neutral state to his own country. Lord Stowell directed restitution, basing a distinction on the character of the person engaged in the correspondence. He is not an executive officer of the Government, acting simply in the conduct of its own affairs within its own territories, but an ambassador resident in a neutral state, for the purpose of supporting an amicable relation with it.<sup>5</sup> In *The Madison*,<sup>6</sup> a consul-general was held to be in a similar privileged position, and the ship was restored, though ordered to pay the captor's expenses.

<sup>1</sup> In the Russo-Japanese War the Russian Prize Courts held that the prohibition did not extend to ordinary correspondence: *The Calchas* (1904), 1 R. & J. Pr. Cas. 118, at p. 141; *The St. Kilda* (1908), *ibid.* 188, at p. 205. Postal correspondence is now protected by Convention No. XI of 1907; see *supra*, p. 263.

<sup>2</sup> (1808), 6 C. Rob. 440; cf. also *The Constantia* (1808), 6 C. Rob. 461n.

<sup>3</sup> At p. 454.

<sup>4</sup> (1807), 6 C. Rob. 461; cf. *The Madison* (1810), 1 Edwards, 224.

<sup>5</sup> At p. 467.

<sup>6</sup> (1810), 1 Edwards, 224.



It was also laid down that force or fraud employed by the enemy provided no excuse to the master of the ship;<sup>1</sup> though in one case, *The Rapid*,<sup>2</sup> a plea of ignorance on the part of the master of the ship was allowed.

In 1914 a British vessel and the cargo were condemned by the New South Wales Prize Court for carrying dispatches for the enemy, in a case where, though the owners and charterers were innocent, the vessel had been sub-chartered to, and was in the service of, the enemy Government, and the cargo belonged to the charterers, whose agent had effected the sub-charter.<sup>3</sup>

Penalty.

The penalty by the British rule was confiscation of the ship and of the cargo, if the property of the same owners.<sup>4</sup>

In the above cases the ships condemned specially undertook the carriage of the dispatches; and there were generally circumstances of fraud or concealment. It has been argued by some writers,<sup>5</sup> and with reason, that the case is different with regular mail-boats, or merchant vessels which carry mails in the ordinary course; and in practice mail-boats have been treated with special consideration,<sup>6</sup> by the United States, for instance, during their wars with Mexico and Spain, by France during the Franco-German War, and by Great Britain during the Boer War, though such indulgence has not been even in recent years universal.

Postal correspondence was specifically dealt with by Arts. 1 and 2 of Convention No. XI of 1907.<sup>7</sup>

The Declaration of London by Art. 45 dealt only with, and applied the recognised penalty only in cases where, the vessel specially undertakes the transmission of intelligence, which presumably includes the carriage of dispatches:—

‘ A neutral vessel will be condemned and will, in a general way, receive the same treatment as a neutral vessel liable to condemnation for carriage of contraband:—

‘ (1) If she is on a voyage specially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy, or with a view to the transmission of intelligence in the interests of the enemy.

<sup>1</sup> *The Caroline* (1802), 4 C. Rob. 259, a case of carriage of troops; *The Susan* (1808), 6 C. Rob. 461n.; *The Orozembo* (1807), 6 C. Rob. 436; *The Hope* (1808), 6 C. Rob. 463n.

<sup>2</sup> (1814), Edwards, 228.

<sup>3</sup> *The Zambesi* (1914), 1 P.C. 358.

<sup>4</sup> *The Atalanta* (1808), 6 C. Rob. 440, 455-60.

<sup>5</sup> e.g. Hautefeuille, *Droits des nations neutres*, II, p. 463; Calvo, § 2801.

<sup>6</sup> See Atherley-Jones, p. 302.

<sup>7</sup> See p. 263, *supra*.

' (2) If to the knowledge of either the owner, the charterer, or the master, she is transporting a military detachment of the enemy, or one or more persons who, in the course of the voyage, directly assist the operations of the enemy.

' In the cases specified under the above heads, goods belonging to the owner of the vessel are likewise liable to condemnation. The provisions of the present Article do not apply if the vessel is encountered at sea while unaware of the outbreak of hostilities, or if the master, after becoming aware of the outbreak of hostilities, has had no opportunity of disembarking the passengers. The vessel is deemed to be aware of the existence of a state of war if she left an enemy port subsequently to the outbreak of hostilities, or a neutral port subsequently to the notification of the outbreak of hostilities to the power to which such port belongs, provided that such notification was made in sufficient time.'

The leading case on the carriage of enemy passengers is *The Orozembo*.<sup>1</sup> In that case an American vessel had been ostensibly chartered by a merchant at Lisbon to proceed in ballast to Macao, and there to take a cargo to America. He proceeded, however, to prepare it for the reception of three military officers and two persons engaged in civil occupations in the Government of Batavia. These five persons came on board, together with a lady and some servants, in all seventeen passengers. Lord Stowell condemned the vessel. He observed:<sup>2</sup> ' In this instance the military persons are three, and there are, besides, other two persons, who were going to be employed in civil capacities in the Government of Batavia. Whether the principle would apply to them alone, I do not feel it necessary to determine. I am not aware of any case in which that principle has been agitated; but it appears to me, on principle, to be but reasonable that, whenever it is of sufficient importance to the enemy, that such persons should be sent out on the public service, at the public expense, it should afford equal ground of forfeiture against the vessel.'

Carriage of  
enemy  
persons.

The same judgment<sup>3</sup> may be cited as an authority for the proposition already referred to in the case of dispatches, that a person engaged in the carriage of military persons cannot protect himself by alleging or proving his own ignorance, or

<sup>1</sup> (1807), 6 C. Rob. 430. Cf. *The Nigretia* (1905), 2 R. & J. Pr. Cas. 201.

<sup>2</sup> At p. 434.

<sup>3</sup> At pp. 434-435.

fraud or force on the part of the enemy: 'If the service is injurious, that will be sufficient to give the belligerent a right to prevent the thing from being done by enforcing the penalty of confiscation. . . . If redress in the way of indemnification is to be sought against any person, it must be against those who have, by means either of compulsion or deceit, exposed the property to danger.'<sup>1</sup>

In *The Friendship*,<sup>2</sup> the vessel was condemned for carrying almost exclusively a contingent of officers and sailors, whose passage was paid for by the French Government; but in this case Lord Stowell expressed the opinion<sup>3</sup> that the penalty would not be enforced where persons, even in the naval or military service of the enemy, were merely travelling as private passengers, in the ordinary way at their own expense. In other words, the ordinary passenger vessel is, it seems, in the same position with regard to persons as is the ordinary mail-boat with regard to dispatches.

During the Russo-Japanese War, 1904, the *Nigretia*, a British vessel, was captured by the Japanese on her voyage from Shanghai to Vladivostock, and was condemned on the ground that she had on board two Russian officers, who were proceeding, under assumed names and under the pretence of belonging to the crew, with the connivance of the charterers, to a naval port of the enemy.<sup>4</sup> In 1916 the French Prize Court condemned a vessel for transporting, under a special charter, an agent of the German Government from China to Siam.<sup>5</sup>

It is to be noted that Art. 45 of the Declaration distinguishes between individual passengers, who bring condemnation upon the ship only if her voyage is undertaken specially with a view to their transport (*i.e.* if it is not her usual service), and military detachments, or persons who, in the course of the voyage, directly assist the enemy (*e.g.* by signalling), in whose case knowledge only need be proved. In the first case, the rule that ignorance of the master, or fraud or compulsion on the part of the enemy, is no defence, will probably continue to be applicable; in the second case it seems clearly excluded.

<sup>1</sup> In *The Zambesi* (1914), 1 P.C. 358, it was held that the innocence of the owners and charterers of a vessel sub-chartered to, and engaged in the service of, the enemy Government did not discharge her from liability to condemnation. But in *The Pontoporos* (1915), 1 P.C. 371, the Prize Court of the Straits Settlements held that the engagement of a neutral vessel in unneutral service is not sufficient to condemn her in the absence of *mens rea* on the part of the owners, charterers or master. (The latter is the more equitable view.)

<sup>2</sup> (1807), 6 C. Rob. 422; cf. *The Caroline* (1802), 4 C. Rob. 256.

<sup>3</sup> At p. 429.

<sup>4</sup> *The Nigretia* (1905), Takahashi, p. 639; 2 R. & J. Pr. Cas. 201.

<sup>5</sup> *The Iro Maru* (1916).



It is further to be observed that in sub-section (1) the persons contemplated are those who are 'embodied' (*incorporés*), and not merely about to be, or likely to be embodied, in the armed forces of the enemy.<sup>1</sup> The word 'embodied' is in itself not free from ambiguity and the sense in which it is used is to be found in the Report of the Drafting Committee: 'Does it include those individuals only who are summoned to serve in virtue of the law of their country, and who have really joined the corps to which they belong? Or does it also include such individuals from the moment when they are summoned and before they join that corps? The question is of great practical importance. Supposing the case is one of individuals who are natives of a continental European country and are settled in America: these individuals have military obligations towards their country of origin; they have, for instance, to belong to the reserve of the active army of that country. Their country is at war and they sail to perform their service. Shall they be considered as embodied in the sense of the provision we are discussing? If we judged by the municipal law of certain countries, we might argue that they should be so considered. But, apart from reasons of pure law, the contrary opinion has seemed more in accordance with practical necessity, and has been accepted by all in a spirit of conciliation. It would be difficult, perhaps even impossible, without having recourse to vexatious measures to which neutral Governments would not willingly submit, to pick out among the passengers in a vessel those who are bound to perform military service and are on their way to do so.'

Meaning of  
'embodied'  
in Art. 45.

In the cases covered by Art. 45, the liability to capture ends with the ending of the voyage; the service performed to the enemy being a single service analogous to the carriage of contraband. This is probably consistent with the British principle; for in *The Caroline*,<sup>2</sup> though it was held that a vessel is liable after the service has come to an end, this was only subject to the proviso that she is still subservient to the purposes of the belligerent.

Duration of  
liability to  
capture.

Nothing was said in the Declaration as to the carriage of persons in the civil service of the enemy, so that the doubt expressed by Lord Stowell in *The Orozembo*<sup>3</sup> remains unresolved; unless, indeed, as seems probable, the true interpretation of the Article is that the carriage of such persons is in no case to be counted as a prohibited act. A consideration

<sup>1</sup> Cf. *The Federico* (1915), *infra*, p. 402.

<sup>2</sup> (1802), 4 C. Rob. 256.

<sup>3</sup> (1807), 6 C. Rob. 430, 434.

of Art. 47,<sup>1</sup> in which there is a similar restriction to persons embodied in armed forces, suggests that such was the intention of the Declaration.

Identifica-  
tion with the  
enemy.

The cases referred to in Art. 45 are cases in which the neutral vessel is not so seriously involved in the service of the enemy as to forfeit her rights as a neutral. But there are acts of a more serious character which may have the result of practically identifying the vessel with the enemy. If, for instance, the neutral vessel is chartered by the enemy to carry cargo or troops, and acts under the orders or direction of the enemy,<sup>2</sup> or if she takes any part in the hostilities, or being under the orders or direction of the enemy, is found in the immediate vicinity of the enemy fleet, she may then be treated as an enemy ship. Thus in 1894, during the Chino-Japanese War, the *Kowshing*, a British vessel, having been chartered by the Chinese Government to transport troops and war material to Korea, was captured by a Japanese cruiser and, refusing to be taken into a Japanese port, was sunk.<sup>3</sup> In the Russo-Japanese War, the *Industrie*, a German vessel, was condemned by the Japanese Prize Court because she was found sending information to the Russians as to the Japanese naval movements, whilst purporting to send war news to a newspaper at Chefoo.<sup>4</sup> A French steamship, the *Quangnam*, having taken in 1905 a cargo of spirits to a Russian squadron, proceeded ostensibly to Manila, but actually directed her course between Formosa and the Pescadores, and was seized by the Japanese in Hatto Channel; she was condemned on the ground that she was employed in the service of the Russians in carrying supplies to their fleet and in reconnoitring on their behalf.<sup>5</sup> In 1915 a Spanish steamship, the *Federico*, having been specially engaged for conveying a number of Germans and Austrians from Barcelona to Genoa for the purpose of joining their regiments, was condemned for unneutral service by the French Prize Court, which held that they were 'embodied in the armed forces of the enemy.'<sup>6</sup>

The cases under this head are dealt with by Art. 46:—

'A neutral vessel will be condemned and, in a general way, receive the same treatment as would be applicable to her if she were an enemy merchant vessel:—

<sup>1</sup> See p. 404, *infra*.

<sup>2</sup> *The Rebecca* (1811), 2 Acton, 119.

<sup>3</sup> Cf. Holland, *Studies in International Law* (Oxford, 1898), p. 126.

<sup>4</sup> *The Industrie* (1905), Takahashi, p. 732: 2 R. & J. Pr. Cas. 323.

<sup>5</sup> *The Quangnam* (1905), Takahashi, p. 735: 2 R. & J. Pr. Cas. 343.

<sup>6</sup> *The Federico* (1915), *Journal Officiel*, May 10, 1915; affirmed by the Conseil d'État, *Journ. Off.*, July 18, 1916.

- ' (1) If she takes a direct part in the hostilities.
- ' (2) If she is under the orders or control of an agent placed on board by the enemy Government.
- ' (3) If she is in the exclusive employment of the enemy Government.
- ' (4) If she is exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy.

' In the cases governed by the present Article, goods belonging to the owner of the vessel are likewise liable to condemnation.' <sup>1</sup>

Under the third head come colliers accompanying the enemy fleet. The fourth head differs from sub-section (2) of Art. 45 in that the case at present contemplated is that in which the vessel is wholly devoted to the service of the enemy for the time being, and the liability to capture continues so long as such service lasts.<sup>2</sup>

There was no unanimity among the delegates as to whether a vessel taking part in a trade which would have been closed to her but for the outbreak of hostilities, should be treated as liable under this Article; and consequently the question raised by ' the rule of the war of 1756 ' was left an open one.<sup>3</sup>

A vessel liable under this section remains a neutral in so far that she has a right of appeal to the proposed International Prize Court on the question whether her position and acts bring her under the section; but that preliminary point being found against her, the jurisdiction of the Court, so far as she is concerned, is ended. She is an enemy vessel, liable as such to be sunk; and the presumption is that the goods on board her are enemy goods, till a neutral establishes his ownership.

Arts. 45 and 46 deal with the liability of the ship and cargo; but there remains the important question as to the treatment of the persons, sometimes incorrectly described as ' contraband persons,' who are found on board. That when

<sup>1</sup> In connection with this Article, it may be mentioned that the Prize Court of the Straits Settlements held in 1915 that in the absence of *mens rea* on the part of the owners, charterers or master, the mere fact that a neutral vessel is engaged in unneutral service does not suffice to condemn her: *The Pontoporos* (1915), 1 P.C. 371, at p. 385; cf. Oppenheim, vol. ii, p. 528. See also *The Proton* (1916), 2 P.C. 107; affirmed on appeal (1918), A.C. 578.

<sup>2</sup> This is in accordance with the decision in *The Caroline* (1802), 4 C. Rob. 256, referred to on p. 401, above.

<sup>3</sup> See p. 323, *supra*.

Rule of War  
of 1756.

Enemy  
persons  
found on  
neutral ships.



the ship is taken in for adjudication these persons may be made prisoners of war is clear; but there will be many cases in which, though the capture of the individuals is justified, the ship is entitled to go free, and the hardship upon, say, a large mail steamer, which happens to be carrying, innocently, a few enemy persons, may be very great if she is interrupted in her voyage and taken into a belligerent port.

Some continental nations have claimed that the belligerent has a right to remove such persons from a neutral vessel, but Great Britain never admitted any such right, and had insisted upon the exceptional nature of a provision contained in the Convention for the 'Adaptation of the Principles of the Geneva Convention to Maritime War,'<sup>1</sup> by which a belligerent could claim the surrender of sick, wounded or shipwrecked men from hospital and other ships. At the Conference of London, however, the British Government expressed itself as willing to modify this attitude, and it was generally agreed that the interests of neutrals would be best served by allowing a belligerent to remove from a neutral vessel persons actually embodied in the armed forces of the enemy.

Strictly speaking, the question would not come within the jurisdiction of the proposed International Prize Court,<sup>2</sup> but for convenience an Article was inserted in the following terms:—

'Any individual embodied in the armed forces of the enemy, who is found on board a neutral merchant vessel, may be made a prisoner of war, even though there be no ground for the capture of the vessel' (Art. 47).

The careful limitation of the persons who may be so dealt with to persons 'embodied in the armed forces of the enemy,' suggests, as we have already pointed out,<sup>3</sup> that the carriage of persons engaged in civil employment is not to be treated as an offence. The best-known case in which the question arose was the case of *The Trent* in 1861,<sup>4</sup> which aroused great excitement. During the American Civil War an English vessel, the *Trent*, cleared from Havana for England *via* St. Thomas, having on board Messrs. Mason and Slidell, who had been appointed envoys from the Confederate States to France and England. Off the coast of Cuba the captain of the *San Jacinto*,

The *Trent*  
case.

<sup>1</sup> Art. 12 of Convention X of 1907.

<sup>2</sup> Cf. Art. 3 of Convention XII of 1907; and see p. 327, *supra*.

<sup>3</sup> See p. 401, *supra*.

<sup>4</sup> *Parl. Papers, N. America*, 1862, vol. lxii (No. 5).

an American frigate, boarded the *Trent* and removed the two envoys to his own vessel, whence they were transferred to prison. On these facts the British Government demanded the restoration of Messrs. Mason and Slidell. The United States acceded to the demand on the ground that the ship should have been brought in for adjudication. Mr. Seward, however, in a long dispatch which illustrates very happily the inconveniences to which a politician exposes himself who gets up his international law for the occasion, maintained that the seizure was in other respects good, and that Messrs. Mason and Slidell were a species of contraband. If they were, the reply was obvious and decisive, that the *Trent* had a neutral destination: 'It is of the very essence of the definition of contraband,' said Lord Russell in his answer, 'that the articles shall have a hostile and not a neutral destination.' But in fact it can only lead to confusion to apply the term contraband to persons at all.<sup>1</sup> A few treaties have referred to soldiers and sailors as contraband; but it would be absurd to insist that a belligerent shall prove strictly an enemy destination, before he can prevent a neutral from conveying a regiment of the enemy's troops. The real issues which should have been argued were first: 'Were Messrs. Mason and Slidell noxious persons, by the carriage of whom the *Trent* had entered for the time being into the service of the enemy': and secondly, 'If they were such persons, was the *San Jacinto* entitled to seize them and remove them from the *Trent*, without taking the vessel in for adjudication?' On the first point the captors may have had some ground for argument in the fact that, the Confederate States not having yet been recognised as a sovereign state,<sup>2</sup> the two envoys were going on a mission to persuade England and France to accord such recognition, and were therefore engaged in a service of a distinctly hostile character; but against this is to be set the argument that if they came as diplomatic agents (had the Confederates been already recognised, they would have been formally ambassadors), it is difficult to see how it was a breach of neutrality to convey them, for though Lord Stowell in *The Caroline*<sup>3</sup> said, 'you may stop the ambassador of the enemy on his passage,' that only meant that you may do so if you can do it without trespassing on neutral soil or ships.<sup>4</sup> On the second

<sup>1</sup> Cf. *The Yangtze Insurance Association v. The Indemnity Marine Mutual Assurance Co.* (1908), 1 K.B. 910; 2 K.B. 504; *supra*, p. 396.

<sup>2</sup> Atherley-Jones, *Commerce in War*, pp. 312-13.

<sup>3</sup> (1807), 6 C. Rob. 468.

<sup>4</sup> Atherley-Jones, p. 313.

point, if the captors were entitled to seize the envoys at all, they were, in taking them out of the *Trent*, instead of taking the *Trent* in for adjudication, only doing what is now regarded as reasonable and convenient in the interests of all parties. In seizing them and allowing the vessel to proceed, they met the very point which Sir William Harcourt<sup>1</sup> urged against them: 'The great and practical danger of the fallacious reasonings of Mr. Seward consists in this, that they would serve to justify, and may be taken to encourage, the captain of the *Tuscarora* to seize the Dover packet-boat and carry her into New York for adjudication, in case Messrs. Mason and Slidell should take a through ticket for Paris.' The defect in this criticism lies in the fact that it begs the whole question in issue, for, strictly speaking, if these envoys were noxious persons, or if they had been military officers, that is exactly what the *Tuscarora* would have been entitled to do; and it was precisely this difficulty which Art. 47 of the Declaration was intended to meet.

The whole question of the *Trent* incident has been much discussed,<sup>2</sup> and opinion is by no means unanimous, even at the present day. However this may be, under the terms of the Declaration of London, Messrs. Mason and Slidell would not be liable to seizure at all; but assuming they were so liable, then the belligerent would be justified in arresting them and allowing the vessel to proceed.

<sup>1</sup> *Letters of Historicus on International Law*, p. 192.

<sup>2</sup> Cf. M. Bernard, *Neutrality of Great Britain during the American Civil War* (1870), pp. 187-205; Moore, *Digest*, vol. vii, § 1265; T. Harris, *The Trent Affair* (Indianapolis, 1896); *Parl. Papers*, N. America, 1862, No. 5.



## CHAPTER VII

### I. FREE SHIPS, FREE GOODS. II. ENEMY SHIPS, ENEMY GOODS

THESE maxims have been so often treated together that it may, perhaps, be worth while to preserve the collocation. There is, however, no necessary or logical connection between the two propositions, and they must be carefully distinguished to avoid confusion. In *The Nereide* the American Supreme Court felt it necessary to emphasise that the treaty of 1795 between the United States and Spain, stipulating merely that free ships should make free goods, did not necessarily imply the converse principle that enemy ships should make enemy goods; so that the goods of a Spanish subject found on board the vessel of an enemy of the United States were not confiscable as prize.<sup>1</sup> The saying 'free ships, free goods,' merely expressed the view that enemy goods shipped on neutral vessels ought to be immune from capture; while by the phrase, 'enemy ships, enemy goods,' the opinion was conveyed that neutral goods shipped on enemy vessels were so tainted by their surroundings as to become liable to condemnation. In each case opinion was divided for many years, and in each case the view favourable to neutral privilege has finally prevailed. In the first case, therefore, the maxim stands: free ships make free goods, that is to say, a neutral vessel redeems the enemy quality of her cargo, so far as to protect it from capture. In the second case, the maxim has yielded to considerations based upon the intrinsic innocence of the cargo itself. It is therefore no longer true that carriage on a belligerent vessel necessarily affects neutral goods with a hostile character. Enemy ships do not make enemy goods, and, to put it shortly, the only goods, apart from contraband, which are now subject to capture on the high seas, are enemy goods on enemy ships,<sup>2</sup> and on the captor's ships.<sup>3</sup> A short account may usefully be added of the steps by which these conclusions have been respectively reached.

Relation  
of these  
maxims.

### I. FREE SHIPS, FREE GOODS

Until the middle of the seventeenth century the simple Earlier view was adopted that enemy goods were enemy goods and, practice.

<sup>1</sup> *The Nereide* (1815), 9 Cranch, 440.

<sup>2</sup> Cf. *The Hakan* (1917), 2 P.C. 479.

<sup>3</sup> Cf. *The Miramichi* (1914), 1 P.C. 137; *The Roumanian* (1915), 1 P.C. 137. See *infra*, p. 412.

as such, liable to capture, wheresoever found. From 1650 onwards a large number of treaties <sup>1</sup> are found stipulating for the immunity of such goods, when found on neutral vessels. This concession was especially valuable to countries engaged in a large carrying trade, and the Dutch were particularly active in procuring its conventional adoption. It was not, however, contended that, apart from treaty, neutral ships were able to protect their cargoes, and in many cases, so far from the ship protecting the cargo, it was held that the cargo tainted the ship and made it subject to capture. Acting upon this view, several French Ordinances declared that neutral ships carrying enemy cargoes were themselves confiscable.

The Armed  
Neutralities.

In the eighteenth century, France attempted to establish the principle of protection, but her own maritime superiority led Great Britain to maintain the liability of the goods to seizure, though she did not attempt to involve the vessel in the fate of the cargo. The First Armed Neutrality in 1780 collectively issued an affirmation of the immunity of enemy goods, but the individual subscribers, in the course of mutual hostilities, soon abandoned their own principles. The reassertion of them by the Second Armed Neutrality in 1800 was equally transient.

Early part  
of 19th  
century.

In the earlier part of the nineteenth century practice was still fluctuating. The number of states which desired amendment was considerable, but the existing law was accurately stated by Mr. Dana <sup>2</sup>:—

‘The United States and Great Britain have long stood committed to the following points as in their opinion established in the law of nations:—

- (1) That a belligerent may take enemy’s goods from neutral custody on the high seas;
- (2) That neutral goods are not subject to capture from the mere fact that they are on board an enemy’s vessel; and
- (3) That the carrying of enemy’s goods by a neutral is no offence, and consequently not only does not involve the neutral vessel in penalty, but entitles it to its freight from the captors as a condition to a right to interfere with it on the high seas. . . . While the Government of the United States has endeavoured to introduce the rule of “free ships, free goods,” by conventions, her courts have always decided that it is not the rule of war. . . .’

Declaration  
of Paris.

The military association of Great Britain and France in

<sup>1</sup> See Wheaton (ed. Phillipson), pp. 703 *seq.*

<sup>2</sup> Note to Wheaton, § 475.

the Crimean War furnished the occasion for the desired change. To secure uniformity of action England temporarily abandoned her practice and acquiesced, on the conclusion of peace, in the Declaration of Paris, 1856, which affirmed the principle of free ships free goods.<sup>1</sup> It will be remembered that the United States, Spain, Mexico and Venezuela have not subscribed to this Declaration, but the United States recognised the neutral claim to protection in the Civil War, and the same course was adopted by both belligerents in the Spanish-American War, and Spain formally acceded to the Declaration in 1907; while the refusal of the United States has not been due to any objection to the principle, but only to the refusal of the rest of the world to adopt the principle of immunity of all private property at sea. The principle of freedom from capture was duly observed by both parties to the Russo-Japanese War in 1904.

But the protection conferred by the Declaration on enemy goods found on neutral vessels does not apply where the neutral consignee acts merely as an agent for enemy firms in whom the property in the goods remains at the time of capture, and the neutral vessels place themselves in the position of vehicles, *e.g.* lighters, for completing the transit of the cargo by an enemy vessel to enemy ports.<sup>2</sup> Transit begins where the goods commence their journey, and not where they are first placed on board ship.<sup>3</sup>

The protection of the neutral flag extends to enemy goods only when they are actually under that flag; if the goods have been freely transhipped by the neutral vessel, they are seizable—either afloat or ashore, on the high seas or in a British port.<sup>4</sup>

Whether the immunity conferred by the neutral flag extends to enemy public property was thought to be doubtful; juristic opinion is not unanimous on the point; but in 1912 the Italian Prize Court answered the question in the negative<sup>5</sup>—and this is the better view, being consonant to general principles.<sup>6</sup>

## 2. ENEMY SHIPS, ENEMY GOODS

The theory that goods of no warlike use to the belligerent were so affected by carriage in his vessels as to become con-

<sup>1</sup> That is, if not contraband.

<sup>2</sup> *The Jeanne*; *The Vera*; *The Forsvik*; *The Albania* (1916), 2 P.C. 227.

<sup>3</sup> Cf. *The United States* (No. 1) (1916), 2 P.C. 390; *The United States* (No. 2) (1917), 2 P.C. 525.

<sup>4</sup> *The Dandolo*; *The Caboto* (1916), 2 P.C. 339 (Ceylon Prize Court); *The Batavier II*; *The Batavier VI* (1917), 2 P.C. 432.

<sup>5</sup> *The Newa*; *The Sheffield*; *The Menzaleh* (1912).

<sup>6</sup> As to the true bearing of the Declaration of Paris, see *infra*, p. 412. As to enemy cargo on neutral ships under the Reprisals Order, March 11, 1915, see *The Progresso* (1916), 2 P.C. 309.



fiscable, owed its survival to the fact that it was too readily accepted as the antithesis of the phrase, 'Free ships, free goods.' 'Free ships, free goods' was a reasonable concession to neutrals, which afforded no sort of justification for the infliction upon them of the hardship involved in 'enemy ships, enemy goods.' The practice expressed in the latter maxim, like commercial blockade, and the rule of war of 1756 in its extended forms, proceeded on a view of neutral rights far too narrow to square with admitted principles of international law. The *Consolato del Mare*<sup>1</sup> denied the liability to capture of neutral goods in enemy bottoms, and the same view was expressed by Albericus Gentilis:<sup>2</sup> 'Property which does not belong to the enemy is nowhere confiscable.'

British view.

England was, as a rule, on the same side, though occasionally the opposite principle was applied;<sup>3</sup> the weight of French policy was thrown into the opposite scale. Lord Stowell in *The Fanny*<sup>4</sup> drew a distinction between the cases where the carrying vessel was a public or a merchant vessel of the belligerent. 'A neutral subject,' he said,<sup>5</sup> 'is at liberty to put his goods on board a merchant vessel, though belonging to a belligerent, subject, nevertheless, to the rights of the enemy who may capture the vessel, but who has no right, according to the modern practice of civilised states, to condemn the neutral property.'<sup>6</sup> Neither will the goods of the neutral be subject to condemnation, although a rescue should be attempted by the crew of the captured vessel, for that is an event which the merchant could not have foreseen. But if he puts his goods on board a ship of force, which he has every reason to presume will be defended against the enemy by that force, the case then becomes very different. He betrays an intention to resist visitation and search, which he could not do by putting them on board a mere merchant vessel, and, in so far as he does this, he adheres to the belligerent; he withdraws himself from his protection of neutrality, and resorts to another mode of defence; and I take it to be quite clear, that if a party acts in association with a hostile force, and relies upon that force for protection, he is, *pro hac vice*, to be considered as an enemy.'

American view.

On the general question the American view coincided with

<sup>1</sup> See Heffter, § 163.

<sup>2</sup> *De jure belli*, lib. ii, c. 22.

<sup>3</sup> Westlake, Part II, pp. 142, 143.

<sup>4</sup> (1815), 1 Dods. 443.

<sup>5</sup> At p. 448.

<sup>6</sup> In *The Roland* (1915), 1 P.C. 188, the Prize Court emphasised that according to prize law property on an enemy ship consigned to an enemy port is *prima facie* enemy property, and it is for the claimants, who allege that the property belongs to them, as neutrals, to make out their claim clearly.

the English, but in *The Atalanta* <sup>1</sup> Johnson, J., refused to follow the distinction insisted upon by Lord Stowell. The learned judge observed: <sup>2</sup> 'The principle of the law of nations, that the goods of a friend are safe in the bottom of an enemy, may be and probably will be changed . . . but so long as the principle shall be acknowledged this court must reject constructions which render it totally inoperative.' Nor did it make any difference that the belligerent vessel was an armed cruiser; <sup>3</sup> it was alleged, argued the learned judge, that the use of such a vessel by a neutral deprived the other belligerent of his right of search, or of capture, or of adjudication of goods, but the right of capture applied only to enemy ships or goods, the right of search to enemy goods on board a neutral carrier; nor was the right of adjudication impaired. The neutral does not deny the right of the belligerent to decide the question of proprietary interest. If it be really neutral, of what consequence is it to the belligerent who is the carrier? He had no right to capture it, and if it be hostile, covered as neutral, the belligerent is only compelled to do that which he must do in all ordinary cases, subdue the ship before he gets the cargo.

The interest of these discussions is now chiefly historical, for at the time of the Crimean War France purchased the English adherence to the doctrine of free ships free goods, at the price of a similar concession on her part in the practice under consideration, and the Declaration of Paris affirmed the English and the American view that neutral traders are in no way bound to refuse the convenience of belligerent carriage, in other words, that enemy ships do not make enemy goods.<sup>4</sup>

The Declaration of London provided (Art. 59) that 'in the absence of proof of the neutral character of goods found on board an enemy vessel, they are presumed to be enemy goods'—which is in accordance with British <sup>5</sup> and American practice,<sup>6</sup> and has been followed in the Great War by both the British <sup>7</sup> and the French <sup>8</sup> Courts; so that if the innocent character of the goods is established they are released.

<sup>1</sup> (1818), 3 Wheaton, 409.

<sup>2</sup> At p. 415.

<sup>3</sup> At pp. 424, 425.

<sup>4</sup> 'Goods' means merchandise; the word does not apply, e.g., to a submarine signalling apparatus leased by a neutral company to the owners of an enemy vessel, and installed thereon: *The Schlesien* (1914), 1 P.C. 13.

<sup>5</sup> Cf. *The Magnus* (1798), 1 C. Rob. 31; *The Rosalie and Betty* (1800), 2 C. Rob. 343.

<sup>6</sup> *The Jenny* (1866), 5 Wall. 183; *The Carlos F. Roses* (1899), 177 U.S. Rep. 655.

<sup>7</sup> *The Roland* (1915), 1 P.C. 188.

<sup>8</sup> *The Porto* (1914), *Journ. Officiel*, March 30, 1915.

It need hardly be said that a neutral trader, in one sense, acts at his peril in employing a belligerent carrier. If belligerent necessity impels the other belligerent to destroy the carrying vessel, the neutral probably has no remedy in respect of the concurrent destruction of his cargo.<sup>1</sup>

Applica-  
bility and  
operation  
of the  
Declaration  
of Paris.

With regard to the applicability and operation of the Declaration of Paris, opinion does not appear to be unanimous. But it may be pointed out here that it was established in the interests of neutrals to protect their shipping from belligerent interference, so long as the enemy goods carried are not contraband. Before the date of the Declaration enemy goods were liable to capture and condemnation irrespectively of their destination. The Declaration does not define contraband; the word is used therein as a description of the goods, the destination of which remains immaterial; otherwise enemy goods on a neutral vessel breaking blockade should also have been included as an exception to the general rule of the Declaration.

Further, the Declaration was not intended to affect and does not affect the rights of belligerents *inter se*; so that one belligerent is not entitled to claim in the courts of the other the protection of the Declaration. If a belligerent being a signatory thereof violates its provisions, the only party who may complain is the neutral shipowner whose Government is a signatory.<sup>2</sup>

<sup>1</sup> See chap. ix, *infra*.

<sup>2</sup> See *The Roumanian* (1915), 1 P.C. 536, at p. 545; *The Miramichi* (1914), 1 P.C. 137, at p. 150; *The Schlesien* (1914), 1 P.C. 13, at p. 15; *The Sorfareven* (1915), 1 P.C. 589, at p. 601; *The Remonstrant* (1917) (not reported; Privy Council, November 20, 1917); *The Posteiro* (1917) (not reported; the President, August 28, 1917). Cf. Bonfils, s. 1526; Despagnet, s. 702.

It may be added that the considerations set forth in the text above have been urged by the Attorney-General in *The Antwerpen*, which is still part heard (July, 1918).



## CHAPTER VIII

### VISIT AND SEARCH

BELLIGERENT public vessels are entitled to stop neutral merchantmen upon the high seas in order to determine their character and the nature of the occupation in which they are engaged. The existence of this right is peremptorily required to enforce the control over neutral trade which belligerents are permitted to exercise.

In the English leading case, *The Maria*,<sup>1</sup> Lord Stowell dwelt upon this point of view: 'The right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destination, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destination what they may, because, till they are visited and searched, it does not appear what the ships or the cargoes or the destination are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle that no man can deny it who admits the legality of maritime capture; because, if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. . . . The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hübner<sup>2</sup> himself, the great champion of neutral privileges.'

British view.

By Art. 63 of the Declaration of London, it was provided that:—

Forcible resistance.

'Forcible resistance to the legitimate exercise of the right of stoppage, search, and capture, involves in all cases the condemnation of the vessel. The cargo is liable to the same treatment as the cargo of an enemy vessel. Goods belonging to the master or owner of the vessel are treated as enemy goods.'

<sup>1</sup> (1799), 1 C. Rob. 359.

<sup>2</sup> M. von Hübner, *De la saisie des bâtiments neutres* (1778).

It is to be noted that the above consequences follow only from forcible resistance; for a mere attempt at flight there is no penalty, except that the vessel obtains no compensation if damaged or sunk, as was explained in the official Report.

As to the cargo, in case of forcible resistance, enemy cargo loses the protection of the neutral flag, and neutral cargo is presumed to be enemy till the contrary is proved. This is a mitigation of the British rule laid down in *The Maria*<sup>1</sup> that resistance involves the whole cargo in confiscation.

Convoyed  
vessels.

The question has been much discussed whether neutral vessels are liable to search at the hands of a belligerent when they are sailing under convoy of a commissioned vessel of their own country. The Governments and writers of the Continent entertain the view that vessels so sailing must not be searched. This opinion cannot be supported by the most influential practice, and the principle on which it proceeds is at least open to question.

Earlier  
practice.

The claim to immunity was first put forward on behalf of Sweden in the seventeenth century, and the Dutch shortly afterwards placed under convoy some merchant vessels sailing from Cadiz to Flanders, and ordered the convoy to resist any attempt at search. Conformably to these instructions, De Ruyter, who was in charge of the convoy, beat off an English squadron which attempted to exercise the right of search. The Dutch claim was revived in the middle of the eighteenth century, and led to a warm dispute between the English and Dutch Governments. In 1781 Sweden put forward a similar claim as against Great Britain, and on appeal to Russia, received from that power, for what it was worth, an assurance that the claim to immunity for convoyed vessels was covered by the principles of the armed neutrality. As Mr. Hall<sup>2</sup> points out, the practice of visiting such vessels had been universal until 1781, and the claim to exemption had only 'acquired such consistency and authority as it could gain by becoming a part of the deliberate policy of a knot of states possessing very defined and permanent interests.' The Second Armed Neutrality laid down the principle of immunity,<sup>3</sup> but the chief signatories of it soon fell short of their own standard.

British view.

The British view was well stated by Lord Stowell in *The Maria*:<sup>4</sup> ' . . . The authority of the sovereign of the neutral

<sup>1</sup> (1799), 1 C. Rob. at p. 377.

<sup>2</sup> 7th ed. p. 793.

<sup>3</sup> See Wheaton (ed. Phillipson), pp. 792-93, and the references there given to the controversy on the subject.

<sup>4</sup> (1799), 1 C. Rob. at pp. 360, 361.

country being interposed in any manner of mere force, cannot *legally* vary the rights of a lawfully commissioned belligerent cruiser. I say *legally*, because what may be given . . . to considerations of comity or of national policy are views of the matter which sitting in this court I have no right to entertain. All that I assert is that *legally* it cannot be maintained that if a Swedish commissioned cruiser, during the wars of his own country, has a right, by the law of nations, to visit and examine neutral ships, the King of England, being neutral to Sweden, is authorised by that law to obstruct the exercise of that right with respect to the merchant ships of his country. . . . Two sovereigns may unquestionably agree, if they think fit, by special covenant that the presence of one of their armed ships, along with their merchant ships, shall be mutually understood to imply that nothing is to be found in that convoy of merchant ships inconsistent with neutrality. . . . But surely no sovereign can legally compel the acceptance of such a security by mere force.'

On this point, as on others, American judges are generally American in agreement with our own—though the practice of the United States has sometimes been at variance—and Story, J., in *The Nereide*,<sup>1</sup> very forcibly observed: 'The law deems the sailing under convoy as an act *per se* inconsistent with neutrality, as a premeditated attempt to oppose, if practicable, the right of search, and, therefore, attributes to such preliminary act the full effect of actual resistance.' And in the subsequent case of *The Atalanta* the American Court held that a convoy was an association for a hostile object, that in undertaking it a state spreads over merchantmen an immunity from search which belongs only to a public vessel, and by joining a convoy every individual vessel puts off her pacific character; hence a neutral who suffers the fate of the convoy has only to regret his own folly in wedding his fortune to the enemy's.<sup>2</sup> view.

In practice, therefore, Great Britain and America are Continental ranged on one side, France, Russia, Germany, Austria, Spain, Italy, Denmark and Sweden on the other. The real weakness of the continental claim is that it presupposes in the commanding officer of a convoy an intimacy of information as to the cargo of the vessels convoyed which has no correspondence with facts. However complete his good faith, how can such view.

<sup>1</sup> (1815), 9 Cranch, 440.

<sup>2</sup> *The Atalanta* (1818), 3 Wheaton, 409. That belligerent or enemy convoy amounts to constructive resistance and entails condemnation, has also been laid down in the recent cases of *The Nancy* (1892), 27 Ct. Cl. 99; *The Sea Nymph* (1901), 36 Ct. Cl. 369.



an officer affirm of his personal knowledge that none of the vessels convoyed has contraband goods or enemy dispatches on board?

In many treaties, however, and even in their instructions to naval officers,<sup>1</sup> the United States Government have adopted the contrary principle of exemption.

Convoys and  
modern  
conditions.

It is pointed out by Mr. Hall<sup>2</sup> that in practice convoys are not likely to be much employed under modern conditions of commerce, as vessels now vary very much in their speed, and it would be highly inconvenient to keep a body of them together. Further, the doctrine of the right to visit ships under convoy has not been enforced by Great Britain in any recent war,<sup>3</sup> and when by the Declaration of Paris enemy goods other than contraband could no longer be seized in a neutral vessel, the chief temptation to exercise the right disappeared, though it still remained important to seize contraband and enemy dispatches. Mr. Hall<sup>4</sup> adds that the officer in command of the convoy cannot guarantee that a vessel under his charge does not intend to break blockade; but with the adoption by the Conference of London of the rule that neutral vessels may not be captured for breach of blockade except within the area of operations of the blockading squadron,<sup>5</sup> this point would become of little importance, and it cannot be suggested, nor is it suggested, that a convoy can protect blockade-runners found within the area.

Conference  
of London.

At the Conference of London there was a marked change in the attitude taken up by several of the nations represented. In their Memorandum Germany adopted the British principle; the United States (following her treaty practice rather than her case law) adopted the principle of exemption for convoyed vessels; Austria, while claiming exemption, regarded the point as open to doubt; and Spain, France, Italy, Japan, the Netherlands and Russia claimed exemption; while Great Britain, though denying the right of exemption in her Memorandum, was nevertheless anxious, on behalf of neutral trade, to restrict as far as possible the right of seizure of contraband, and treating the original British contention as having lost its importance, expressed herself as prepared to accept the French view. This was finally adopted in the following Articles:—

<sup>1</sup> Lawrence, *Principles*, 4th ed. p. 670; Glass, *Marine International Law*, p. 168.

<sup>2</sup> 7th ed. p. 797.

<sup>3</sup> See *General Instructions to British Delegates*, sect. 18, Cd. 4554.

<sup>4</sup> 7th ed. p. 796.

<sup>5</sup> Art. 17.

- ' Neutral vessels under national convoy are exempt from search. The commander of a convoy gives in writing at the request of the commander of a belligerent warship, all information as to the character of the vessels and their cargoes, which could be obtained by search ' (Art. 61).
- ' If the commander of the belligerent warship has reason to suspect that the confidence of the commander of the convoy has been abused, he communicates his suspicions to him. In such a case it is for the commander of the convoy alone to investigate the matter. He must record the result of such investigation in a report, of which a copy is handed to the officer of the warship. If, in the opinion of the commander of the convoy, the facts shown in the report justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels ' (Art. 62).

It will be observed that complete reliance is placed on the conscientiousness of the neutral, and on his ability to know the nature of all the cargo which he is protecting; and any breach of duty in this respect can only be the subject-matter of diplomatic representations. The importance of this aspect of the question was recognised in the official commentary. Stress is laid upon the duty of the neutral to exercise a genuine supervision at the outset of, and throughout, the voyage; and it is recommended that, as an act of courtesy, an officer of the belligerent cruiser shall be allowed to be present at any search made in pursuance of Art. 62. The change in the British attitude (with which change Germany, in spite of her Memorandum, concurred) was defended<sup>1</sup> by a desire to arrive at a unanimous conclusion, and to abandon an isolated attitude; whether it was wise may be open to doubt, but there is good ground for supposing that the point is no longer of much importance, and that with the definition and limitation of contraband, neutrals are not likely to take frequently upon themselves the expense and responsibilities involved in convoying their own merchant vessels.<sup>2</sup>

When a commissioned vessel wishes to exercise the right of search, it is usual to fly the colours and fire off a gun, called the affirming gun ('coup de semonce'), as a signal to the

Formalities  
of search.

<sup>1</sup> *Parl. Papers, Misc. No. 5* (1909), Cd. 4555, p. 260.

<sup>2</sup> The Declaration not being ratified, Great Britain claimed the right during the Great War to search a vessel under Dutch convoy: *Parl. Papers, Misc. No. 13* (1918).

merchant vessel.<sup>1</sup> It is generally agreed that pursuit under false colours is not illegitimate,<sup>2</sup> but that the pursuing warship may not fire until she has assumed her national flag. The requirement that the affirming gun shall be fired is common in continental practice, but is not obligatory according to the British and American view. In *The Marianna Flora*,<sup>3</sup> Story, J., delivering the judgment of the Court, made the following observations on this point: 'We are not disposed to admit that there exists any such universal rule or obligation of an affirming gun as has been suggested at the bar. It may be the law of the maritime states of the European continent already alluded to, founded on their own usages or positive regulations. But it does not hence follow that it is binding upon all other nations. It was admitted at the argument that the English practice is otherwise; and surely, as a maritime power, England deserves to be listened to with as much respect on such a point as any other nation.'

In the same case it was pointed out that although the right of search does not exist in time of peace, yet a cruiser has a right to approach a foreign vessel for purpose of observation; it was held further that the vessel approached is under no obligation to lie-by, but that she has no right to fire at a cruiser approaching upon a mere suspicion that she is a pirate, and if this be done the cruiser may lawfully repel force by force and capture her. In order to make the actual visit, an officer is usually sent on board the merchantman from the cruiser, but sometimes the master of the merchantman is summoned to bring his papers to the cruiser for examination.<sup>4</sup> Capture of a vessel searched is considered to be legitimate where the papers are false or insufficient, and where the results of the visit make it certain, or at least highly probable, that the vessel is tainted by any of the forms of illegality which have been already considered. If visit and search are impracticable at sea, in view of the conditions of modern warfare, a vessel may be taken into harbour for the purpose. This practice was approved in the Great War by the British,<sup>5</sup> French<sup>6</sup> and German<sup>7</sup> Prize Courts.

<sup>1</sup> On the formalities of visit and search, see Atherley-Jones, chap. vi; Oppenheim, vol. ii, §§ 418 *seq.*

<sup>2</sup> See *The Eleanor* (1817), 2 Wheat. 345. Cf. the German Prize Regulations of 1914, of which Art. 82 says: 'During the chase it is not necessary to show the war flag; any mercantile flag may be flown.'

<sup>3</sup> (1826), 11 Wheaton, 1.  
<sup>4</sup> This is, however, prohibited by the *Manual of Prize Law* (1888), No. 198; and it is contrary to the view expressed by the Institute of International Law, § 12 of the Project adopted in 1883 and 1887.

<sup>5</sup> *The Zamora* (1916), 2 P.C. 1, at p. 28.

<sup>6</sup> *The Federico* (1915), *Journal Officiel*, May 10, 1915.

<sup>7</sup> *The Bertha Elizabeth* (1915).



## CHAPTER IX

### THE DESTRUCTION OF PRIZES AND COMPENSATION <sup>1</sup>

#### I. ENEMY PRIZES

WHEN a belligerent captures a commissioned vessel belonging to the enemy Government, she becomes on capture his own property, and he is entitled to deal with her as he pleases—he may destroy her or take her into port. All persons found on board become prisoners of war, and all goods become the property of the captor.<sup>2</sup> In the case of an enemy merchant ship there is neither unanimous opinion nor uniform practice as to the relation of seizure to ownership. The earlier law deemed the title to have passed as soon as the capture became effective; but the test of effectiveness varied—one view (supported by the *Consolato del Mare*) held it to be ‘deductio infra præsidia’ (taking her to a safe place), another required twenty-four hours’ possession.<sup>3</sup> The modern view, however, tends to regard the captor’s right as one of possession only,<sup>4</sup> which may be transformed into a proprietary right by the condemnation of a prize court. In *The Flad Oyen*, Lord Stowell observed that the requirement of due condemnation for passing the ownership in prize was in accordance with the general practice of nations;<sup>5</sup> and in *The Henrick and Maria* he emphasised the same principle, holding that ‘deductio infra præsidia’ was not enough, that a purchaser’s title can be based only on a sentence of condemnation; and therefore the prize must be brought in for

Relation  
of seizure to  
ownership.

<sup>1</sup> The present chapter is intended to be supplemented by Sir Frederick Smith, *The Destruction of Merchant Ships under International Law* (London, 1917).

<sup>2</sup> Prize bounty is awarded by the British Prize Court under the Naval Prize Act, 1864, s. 42 [cf. O. in C. March 2, 1915], for the destruction of an enemy warship; cf. *The Carmania* (1916), 2 P.C. 77; *The Sydney* (1916), 2 P.C. 231. Prize bounty is a purely naval reward; no award is made if the destruction results from joint naval and military action: *H.M.S. Triumph and Usk* (1917), 2 P.C. 424. Where an enemy warship is sunk by her own crew to avoid capture by a British squadron which was present, prize bounty may be awarded: *The Meteor* (1916), 2 P.C. 313. Cf. *The Canopus* (1916), 2 P.C. 383.

<sup>3</sup> Cf. *The Santa Cruz* (1798), 1 C. Rob. 49, at pp. 58 seq.

<sup>4</sup> Cf. Oppenheim, vol. ii, p. 231.

<sup>5</sup> *The Flad Oyen* (1799), 1 C. Rob. 135.

adjudication.<sup>1</sup> There are American judicial pronouncements to the same effect;<sup>2</sup> and in 1905 the Russian Prize Court held a like view.<sup>3</sup> Similarly, in 1915, Lord Mersey, delivering the judgment of the Privy Council, observed: 'The effect of a condemnation is to divest the enemy subject of his ownership as from the date of the seizure, and to transfer it, as from that date, to the Sovereign or to his grantees.'<sup>4</sup>

When impossible to bring in.

In practice, systematic destruction of enemy prizes has been the exception,<sup>5</sup> and the general rule is that all prizes are brought in for adjudication, unless there are practical difficulties in the way of such a course. Such difficulties have been, for instance, distance from a port of the captor, the danger of compromising the safety of the captor's vessel or the success of the operations in which she is engaged, the unseaworthy character of the prize, lack of men to form a prize crew, lack of provisions, or water, or presence of disease.<sup>6</sup>

In *The Felicity*,<sup>7</sup> Lord Stowell stated that if it was impossible to bring in, the next duty was to destroy, an enemy ship, and held destruction to be justified by showing that the immediate service on which they (the captors) were engaged, that of watching the enemy's ship of war, the *President*, with intent to encounter her, though of inferior force, would not permit them to part with any of their own crew to carry her into a British port. 'Under this collision of duties, nothing was left but to destroy her, for they could not, consistently with their general duty to their own country, or indeed its express injunctions, permit enemy's property to sail away unmolested. If it is impossible to bring in, their next duty is to destroy enemy's property. Where doubtful whether enemy's property, and impossible to bring in, no such obligation arises, and the safe and proper course is to dismiss.'

<sup>1</sup> *The Henrick and Maria* (1799), 4 C. Rob. 43, at p. 55. Cf. *The Kierlighett* (1800), 3 C. Rob. 96; *The Cosmopolite* (1801), 3 C. Rob. 333.

<sup>2</sup> Cf. *Miller v. The Resolution* (1781), 2 Dallas, 1; *Commodore Stewart's Case* (1864), 1 Ct. Cl. 113.

<sup>3</sup> *The Knight Commander* (1905), 1 R. & J. Pr. Cas. 75.

<sup>4</sup> *The Odessa* (1915), 1 P.C. 554, at p. 559. Cf. *The Appam* (1917), *Amer. Journ. of Int. Law*, April, 1917, p. 443. (The American Supreme Court did not make an explicit pronouncement on the point; but from the decision it may be inferred that condemnation is necessary to pass ownership.)

<sup>5</sup> In 1812 the United States burnt all, and in the American Civil War the *Alabama* burnt most of the enemy ships captured.

<sup>6</sup> Smith, *op. cit.* pp. 27 seq.

<sup>7</sup> (1819), 2 Dodson, 38, at pp. 385, 386; cf. also *The Acteon* (1815), 2 Dodson, 48.

In *The Leucade*<sup>1</sup> it was said that it might be 'justifiable or even praiseworthy' to destroy an enemy vessel.

The view of the American Courts was illustrated in the case of *The Admittance*:<sup>2</sup> 'As a general rule, it is the duty of the captor to bring it (the captured vessel) within the jurisdiction of a prize court of the nation to which he belongs, and to institute proceedings to have it condemned. . . . But there are cases when, from existing circumstances, the captor may be excused from the performance of this duty, and may sell or otherwise dispose of the property before adjudication. And where the commander of a national ship cannot, without weakening inconveniently the force under his command, spare a sufficient crew to man the captured vessel, or when the orders of his Government prohibit him from doing so, he may lawfully sell or otherwise dispose of the captured property in a foreign country, and may afterwards proceed to adjudication in a court of the United States. But if no sufficient cause is shown to justify the sale, and the conduct of the captor has been unjust and oppressive, the court may refuse to adjudicate upon the validity of the capture, and may award restitution and damages against the captor, although the seizure as prize was originally lawful or made upon probable cause.' American view.

The ship in this case had been sold, but it would appear that the reasoning is equally applicable in the case of destruction. It will be shown later how the suggestion contained in the last sentence above quoted was adopted by the Conference of London, as providing one of the chief safeguards against destruction of neutral vessels.

The French Court in 1872 went so far as to hold in the case of two German vessels, the *Ludwig* and the *Vorwärts*,<sup>3</sup> which had been destroyed, that no indemnity was payable to the owners of neutral goods which had been destroyed with the vessels: 'The Declaration (of Paris) does not import that an indemnity can be demanded for injury which may have been caused to him either by a legally good capture of the ship or by acts of war which may have accompanied or followed the capture. . . . The destruction of the ships with their cargoes having taken place under orders of the commander of the capturing ship, because from the large number of prisoners on board no part of the crew could be spared for the navigation of the prize, such destruction was an act of war,' Continental practice.

<sup>1</sup> (1855), Spinks, 217.

<sup>2</sup> *Jecker v. Montgomery* (1851), 13 Howard, 498.

<sup>3</sup> Calvo, vol. v, sect. 3033; Atherley-Jones, p. 298.



the propriety of which the owners of the cargo could not call in question, and which barred all claim on their part to an indemnity.'

During the Great War the French Prize Court adopted the rule that the destruction of an enemy merchantman is legally justifiable, when the circumstances of the case imperatively demand it, *e.g.* if the preservation of the prize would have jeopardised the operations of the captor's cruiser;<sup>1</sup> if it was impossible to take the vessel into port owing to the unfavourable state of the sea or stress of weather;<sup>2</sup> if she was in an unseaworthy condition;<sup>3</sup> and, generally, if demanded by the military necessity of the captor.<sup>4</sup> The same principles were held to be applicable to absolute contraband cargoes.<sup>5</sup>

Similarly, in the present war the German Prize Court has held<sup>6</sup> that if destruction of the prize is permissible on the ground of military necessity, the destruction of neutral cargo on board is likewise permissible, and the owner thereof is not entitled to indemnity under the Declaration of Paris.<sup>7</sup>

Russia, too, issued regulations and instructions in 1895, and again in her war with Japan, which authorised the destruction of prizes, whether enemy or neutral,<sup>8</sup> 'in exceptional cases, where the preservation of a captured vessel appears impossible, on account of her bad condition or entire worthlessness, the danger of her recapture by the enemy, or the great distance or blockade of ports, or else on account of danger threatening the ship which has made the capture or the success of her operations.' In the case of the sinking of the *Knight Commander* in 1905, a strong protest by the British Government produced an assurance that no more neutral vessels would be sunk; and in the similar case of the *Thea* in the same year, compensation was paid to its German owners.<sup>9</sup>

On principle, there can be little doubt that, if the right to capture private property at sea is conceded at all, the destruction of enemy prizes is justifiable, in circumstances of *force majeure*; the chief safeguard against it lies in the fact

<sup>1</sup> *The Mahrouseh* (1915), *Journal Officiel*, Dec. 17, 1915.

<sup>2</sup> *The Jabr-el-Kavater* (1915), *ibid.* Jan. 4, 1916.

<sup>3</sup> *The Cheref* (1915), *ibid.* Jan. 9, 1916.

<sup>4</sup> *The Sélimié* (1916), *ibid.* March 13, 1916.

<sup>5</sup> *The Catania* (1915), *ibid.* Feb. 11, 1916.

<sup>6</sup> *The Glitra* (1915), *Amer. Journ. of Int. Law*, Oct. 1916, p. 921; *The Indian Prince* (1916), *ibid.* p. 930.

<sup>7</sup> There has been some doubt on the point, but the decision is in accordance with sound principle.

<sup>8</sup> *Report of Royal Commission on supply of food and raw material in time of war*, p. 25, 1905, Cd. 2643.

<sup>9</sup> As to destruction of neutral prizes, see *infra*, p. 424.

that it is not to the interest of the captor to destroy what is certain to become his own property, if such destruction can at all be avoided.

Whatever difference of opinion and practice there has been in regard to the circumstances of *force majeure* justifying the destruction of enemy merchantmen, there is and has been unanimity as to the obligation imposed on captors to provide first for the safety of passengers and crew on board and for the preservation of the ship's papers. This rule is explicitly enforced in the naval regulations of maritime states,<sup>1</sup> emphasised by jurists, and has been uniformly observed in the actual practice of wars<sup>2</sup>—until in the present war Germany violated the rule in so gross and flagrant a manner and to such an extent as to arouse the indignation of the civilised world.

Safety of passengers and crew.

Hence it follows that enemy merchantmen may not be sunk or otherwise destroyed without warning,<sup>3</sup> and that, even though warning be given, such means of attack should not be adopted as would render it impossible for the attacking forces to conform to the rule.

Warning necessary.

It follows, again, that the use of submarines against merchantmen is illegitimate, if due provision is not made for the safety of crew, passengers and ship's papers, and the status and character of the vessel and cargo are not verified.<sup>4</sup> The use of new weapons in warfare is not permissible, unless provided for by the rules of international law; and no single nation, as an American court said, may change the law of the sea.<sup>5</sup>

Use of submarines against merchantmen.

Whilst merchantmen may not take part in offensive operations, they are permitted to evade search or defend themselves in case of attack;<sup>6</sup> it may not be prudent to offer resistance to a warship, but it is not illegal.

Resistance by merchantmen.

The use of arms by a merchant ship<sup>7</sup> for purposes of self-

Armed merchantmen.

<sup>1</sup> Smith, *op. cit.* pp. 46 seq.

<sup>2</sup> *Ibid.* pp. 49, 50.

<sup>3</sup> Cf. the observation of Lord Stowell in *The Peacock* (1802), 4 C. Rob. 185, at p. 187.

<sup>4</sup> Cf. the British and American Notes of 1915 and 1916; Smith, *op. cit.* pp. 52, 53.

<sup>5</sup> *The Scotia* (1871), 14 Wall. 170.

<sup>6</sup> Cf. *The Two Friends* (1799), 1 C. Rob. 271; *The Nereide* (1815), 9 Cranch, 388; *Le Pégou* (or *Pigou*) (1800), 2 Pistoye et Duverdy, 51 (for other references and fuller discussion, see Smith, *op. cit.* pp. 18 seq.).

<sup>7</sup> On the question of armed merchantmen, see A. Pearce Higgins, *Defensively Armed Merchantmen and Submarine Warfare* (London, 1917), and the same author's *Armed Merchant Ships*, in *Amer. Journal of Int. Law*, vol. viii (1914), pp. 705 seq.

defence is legitimate; the practice is sanctioned by the long-established custom of many maritime powers, and in this country it has been in use for at least three centuries. It has been recognised in courts of law<sup>1</sup> and in the naval codes and ordinances of several states;<sup>2</sup> and during the Great War various neutral Governments have admitted its legality. Hence, all that has been said above with regard to unarmed merchantmen applies equally to armed merchantmen.<sup>3</sup>

Ransom.

Some nations have, in mitigation of the extreme rigour of the right of destruction, adopted the principle of ransom, in accordance with which the master of the prize is allowed to buy back the vessel by giving a ransom bill to the captor and, usually, a hostage as collateral security. The British courts<sup>4</sup> held that an alien enemy having no *locus standi* could not sue upon a ransom bill, payment being only enforceable indirectly through an action by the hostage for the recovery of his freedom.<sup>5</sup> In 1782 ransoming was prohibited by statute<sup>6</sup> as being against public policy, but under a later statute<sup>7</sup> power was reserved to issue regulations by Order in Council permitting or forbidding ransom contracts. The practice has been approved in the United States<sup>8</sup> and treated as an exception to the rule against trading between enemies; it is approved in France and Spain with limitations in the case of privateers;<sup>9</sup> but is prohibited in Sweden, Denmark, Holland and Russia.

## 2. NEUTRAL PRIZES

Adjudication  
necessary.

The obligations of belligerents in regard to enemy merchantmen apply much more emphatically to the case of neutral merchantmen,<sup>10</sup> so that the authorities cited for the former may be invoked *a fortiori* for the latter. Under the customary law it

<sup>1</sup> Cf. *The Panama* (1899), 176 U.S. 535.

<sup>2</sup> Cf. the Regulations of the United States of March 25, 1916: *Amer. Journ. of Int. Law, Supplement*, Oct. 1916, pp. 367-372.

<sup>3</sup> The words 'armed ship' (as used in the O. in C. of March 2, 1915, awarding prize bounty in case of destruction of armed vessels of the enemy) refer only to a fighting unit of the Fleet, i.e. a ship commissioned and armed for offensive action in naval warfare: *H.M. Submarine E 14* (1917), 2 P.C. 404.

<sup>4</sup> *Anthony v. Fisher* (1781), Doug. Rep. 649n. And on the whole question see Atherley-Jones, *Commerce in War*, pp. 640 seq.

<sup>5</sup> *The Hoop* (1799), 1 C. Rob. 196, 201.

<sup>6</sup> 22 Geo. III, c. 25.

<sup>7</sup> The Prize Act, 1864 (27 & 28 Vict. c. 25); and cf. the rejected Naval Prize Bill, 1910, sect. 40.

<sup>8</sup> *Goodrich v. Gordon* (1818), 15 John. 6; and cf. *Maisonnaire v. Keating* (1815), 2 Gall. 325, in which the principle is approved when applied between belligerents and neutrals.

<sup>9</sup> Atherley-Jones, *Commerce in War*, p. 641.

<sup>10</sup> See Smith, *op. cit.* pp. 70 seq.



has long been an established rule <sup>1</sup> that captured neutral vessels must be taken in for adjudication, and if this be found impossible they must be released, even if there be a doubt whether they are neutral or enemy. The plea of military necessity will not avail; and the captor may not arrogate to himself the functions of a judicial tribunal. It is only a valid condemnation of a prize court that transfers the ownership to the captor; till then he is not entitled to deal with the prize as he deems fit. So long as neutral vessels do not encroach within the defined war-zone, and do not violate their neutrality (*e.g.* by blockade running, contraband trading or unneutral service), they must be left alone, subject, of course, to visit and search in case of suspicion.

An attack on a neutral vessel is excusable if it is the result of error, if she accidentally enters the area of action and the act results from the legitimate operations against the enemy; and it is justifiable if, after one warning, she deliberately enters therein,<sup>2</sup> or acts in complicity with the enemy, or repeatedly attempts to escape after the summons to heave to, or offers forcible resistance to visit. (Unlike an enemy merchantman, a neutral merchantman may not resist visit and search, unless the belligerent acts in a manifestly illegal manner.) Mere suspicion can never be a valid ground for attacking a merchantman.<sup>3</sup>

When  
attack  
excusable.

The rule of international law on this subject was correctly stated in the American Note to Germany, February 10, 1915: ' . . . The sole right of a belligerent in dealing with neutral vessels on the high seas is limited to visit and search, unless a blockade is proclaimed and effectively maintained. . . . To declare or exercise a right to attack and destroy any vessel entering a prescribed area of the high seas without first certainly determining its belligerent nationality and the contraband character of its cargo would be an act so unprecedented in naval warfare that the Government is reluctant to believe that the Imperial Government of Germany in this case contemplates it as possible. The suspicion that enemy ships are using neutral flags improperly can create no just presumption that all ships traversing a prescribed area are subject to the same suspicion. It is to determine exactly such questions that this

<sup>1</sup> Cf. *The Felicity* (1819), 2 Dods. 381, at p. 385; *The Acteon* (1815), 2 Dods. 48; *The Leucade* (1855), Spinks, 217, at pp. 221, 222.

<sup>2</sup> Cf. the case of the *Hoffnung* (1800), Örtolan, *Dip. de la mer*, ii, pp. 30, 31.

<sup>3</sup> Cf. Sir Edward Fry, *The Rights of Neutrals as illustrated by Recent Events* (a paper read before the British Academy, May 23, 1906), in *Proceedings of the British Academy*, vol. ii, p. 3; cited in Smith, *op. cit.* pp. 76-78.

Government understands the right of visit and search to have been recognised.' <sup>1</sup>

When  
destruction  
permissible.

But it has been recognised even by our own Courts that there may be exceptional cases in which the destruction may be justified, though not without paying full compensation to the owner; if for instance a squadron of the enemy is near, so that it is impossible to put a prize crew on board, and to release the ship would mean that it might convey information to the enemy; <sup>2</sup> and from the cases the rule was inferred, not that destruction is never permissible, but that the owner must always be compensated, however justifiable the destruction may have been from the belligerent point of view. <sup>3</sup> The rule of non-destruction, however, has been consistently observed in a long succession of past wars until the beginning of the present century; in the Russo-Japanese War, the Russian forces sank a number of neutral vessels; <sup>4</sup> and in the Great War the German forces destroyed a great number of neutral vessels—a violation of law that forced the United States to enter the war. After the Russo-Japanese War, juristic doctrine tended in favour of destruction in certain clearly-defined conditions, *e.g.* when the neutral prize was found carrying such contraband as arms and munitions in very large quantities, and it was impossible to take her in; and it was felt, too, that the views of various states were becoming more markedly opposed to the British practice.

Declaration  
of London.

At the Second Peace Conference in 1907, an attempt was made to arrive at an agreement on the question, but in vain. <sup>5</sup> The Conference of London in 1908-9 was more successful. On the general principle that it is the duty of the captor to take the prize in, there was practical unanimity among the nations represented at that Conference, and this agreement was embodied in Art. 48:—

'A neutral vessel which has been captured may not be destroyed by the captor; she must be taken into such port as is proper for the determination there of all questions concerning the validity of the capture.'

It was the desire of Great Britain at the Second Peace

<sup>1</sup> *Amer. Journ. of Int. Law, Supplement*, vol. ix (July, 1915), pp. 86, 87.

<sup>2</sup> *The Acteon* (1815), 2 Dods. 48.

<sup>3</sup> Cf. *The Felicity* (1819), 2 Dods. 381; *The Leucade* (1855), Spinks, 217. But as to the alleged 'justification' of destruction on payment of compensation, see Smith, *op. cit.* pp. 87-90. There is a doubt, however, as to the duty to compensate, if the vessel was clearly liable to confiscation.

<sup>4</sup> See *supra*, p. 422, and Smith, *op. cit.* pp. 91-94.

<sup>5</sup> See Smith, *op. cit.* pp. 95-97.

Conference to make this rule absolute; and at the Conference of London, Austria, Japan and the Netherlands took up a similar attitude. It was agreed, however, that there were circumstances in which destruction might be justifiable; and the chief subject of contention was the character of these circumstances. Particular objection was taken by Great Britain and Spain to admitting inability to spare a prize crew as an excuse, as this would justify destruction in the majority of cases where the captor had no port of his own near at hand, and would involve great hardship to the passengers and crew of the prize, who would be exposed to the risks incurred on board a belligerent warship.

The ultimate decision at the London Conference was in the nature of a compromise, which defined the circumstances in which destruction was permissible in such a way as to leave a wide discretion to the projected International Prize Court:—

‘ As an exception, a neutral vessel which has been captured by a belligerent warship, and which would be liable to condemnation, may be destroyed if the observance of Art. 48 would involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time ’ (Art. 49).

The first condition thus is that the prize must be one which would be liable to condemnation. If, for instance, her offence is the carriage of contraband, the contraband must be, in value, weight, volume or freight, more than half her cargo; <sup>1</sup> and she must have been aware of the outbreak of hostilities, or of the declaration of contraband applying to her cargo, under Art. 43.<sup>2</sup> In view of the difficulty of estimating the proportion of the contraband without full inquiry, it seemed probable that this condition would make belligerents very cautious in the exercise of the right, and restrict the practice of destruction within very narrow limits.

Conditions  
necessary for  
destruction.

With regard to the second condition, danger to the safety of the captor's ship, or its success, enumeration of particular circumstances not coming within these words was thought undesirable, as such enumeration could not be exhaustive, and would lead to the implication that all cases not mentioned were included. It follows that it is left to the Courts to deal with each case on its merits, and in view of the propositions put forward by several nations, there is no certainty that lack

<sup>1</sup> Art. 40, on p. 360, *supra*.

<sup>2</sup> See p. 349, *supra*.



of a prize crew will not be regarded as an excuse for destruction. But in view of the words of the Article and of the official Report, the danger contemplated seems clearly an actual present danger of hostile attack. 'It is, of course, the situation at the moment when the destruction takes place which must be considered, in order to decide whether the conditions are or are not fulfilled. For a danger which did not exist at the actual moment of the capture may have appeared some time afterwards.'<sup>1</sup> It seems probable, therefore, that no court containing, as the International Court will contain, a majority of neutrals, will treat the danger as proved, except when the captor is operating with a hostile fleet in his neighbourhood. The British delegates reported that 'the delegates representing those powers which have been most determined in vindicating the right to destroy neutral prizes, declared that the combination of the rules now adopted respecting destruction and liability of the ship, practically amounted in itself to a renunciation of the right in all but a few cases. We did not conceal the fact that this was exactly the object at which we aimed.'

Persons on board.

Art. 50 contains provision for the safety of the persons on the prize and for the preservation of the necessary evidence:—

'Before the vessel is destroyed, all persons on board must be placed in safety, and all the ship's papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the warship.'

Proof of exceptional necessity.

A further safeguard against reckless destruction is contained in Art. 51:—

'A captor who has destroyed a neutral vessel must, prior to any decision respecting the validity of the prize, establish that he only acted in the face of an exceptional necessity of the nature contemplated in Art. 49. If he fails to do this, he must compensate the parties interested, and no examination shall be made of the question whether the capture was valid or not.'

Compensation.

The result of this is that when a vessel is destroyed, the captor must first prove circumstances justifying her destruction, before the question of the liability of the vessel can arise at all;<sup>2</sup> if he fails in that, he must compensate the vessel, however great her violation of the laws of neutrality. The converse

<sup>1</sup> Report on Art. 49.

<sup>2</sup> This assumes, of course, the Article of the Declaration to be binding.

case of a justifiable destruction but an invalid capture is dealt with in Art. 52:—

‘ If the capture of a neutral vessel is subsequently held to be invalid, though the act of destruction has been held to have been justifiable, the captor must pay compensation to the parties interested, in place of the restitution to which they would have been entitled.’

And neutral innocent goods on board must be paid for in any event:— Neutral cargo.

‘ If neutral goods not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation ’ (Art. 53).

The provisions of Art. 51 are substantially new, though they in effect adopt the suggestion made by the American Court in *The Admittance*,<sup>1</sup> and, taken with the provisions of the other Articles on the subject, they provide in theory very effectually against reckless destruction by belligerents, and realise the aim of the British Government, which was to reduce the practice of destruction within the narrowest possible limits.<sup>2</sup>

We have seen that by Art. 44<sup>3</sup> it was provided that a vessel not liable to condemnation because the contraband on board was less than the proportion of one half, might be allowed to go free, instead of being taken in for adjudication, if she were willing to hand over, and the captor were willing to receive, the contraband cargo. It was agreed to be unreasonable to compel the belligerent in all cases, where the neutral did not agree to hand over the contraband, to allow the vessel to proceed if he were unable to take her into port. It was decided, therefore, to give to the captor the right to seize and destroy the contraband if the circumstances were such that the vessel, if herself liable to condemnation, might with justification be destroyed:— Destruction of cargo.

‘ The captor has the right to demand the handing over, or to proceed himself to the destruction, of any goods liable to condemnation found on board a vessel not herself liable to condemnation, provided that the circumstances are such as would, under Art. 49, justify the destruction of a vessel herself liable to condemnation. The captor must enter the goods surrendered or destroyed in the log-book of the vessel stopped, and

<sup>1</sup> See p. 421, *supra*.

<sup>2</sup> See p. 428, n. 2, *supra*.

<sup>3</sup> See p. 361, *supra*.

must obtain duly certified copies of all relevant papers. When the goods have been handed over or destroyed, and the formalities duly carried out, the master must be allowed to continue his voyage.

‘ The provisions of Arts. 51 and 52 respecting the obligations of a captor who has destroyed a neutral vessel are applicable ’ (Art. 54).

Compensation after release.

It is convenient at this point to refer to the general provision contained in the Declaration of London, relative to cases where vessels or goods are seized and afterwards released:—

‘ If the capture of a vessel or of goods is not upheld by the prize court, or if the prize is released without any judgment being given, the parties interested have the right to compensation, unless there were good reasons for capturing the vessel or goods ’ (Art. 64).

This principle is of general application, whatever the cause for which the capture was made; and it applies whether the release be after judgment or by the intervention of the executive.

The British Courts<sup>1</sup> have held that restitution may be attended with any one of the following consequences:—

1. The claimants may be ordered to pay to the captors their costs and expenses.
2. The restitution may be simple restitution without costs or expenses or damages to either party, or
3. The captors may be ordered to pay costs and damages to the claimant.

Each case must be decided according to its own circumstances, and the ship will not obtain compensation if her capture was due to her own misconduct, or was made in circumstances of suspicion; but the captor must show reasonable and probable cause for the capture, and will not be excused by honest mistake.<sup>2</sup> The most important grounds of suspicion, which, if not actually entailing in themselves confiscation, yet prevent the claimant from being treated with any leniency, are the possession of false or double documents, and the spoliation (destruction) of papers.<sup>3</sup> In the case of *The Allanton*, which

<sup>1</sup> *The Ostsee* (1856), 5 Moore, P.C. 150; *The Leucade* (1855), Spinks, 217; *The Acteon* (1815), 2 Dods. 48, 51; *The Rufus* (1815), 2 Dods. 48, 55.

<sup>2</sup> *The Ostsee* (1856), 5 Moore, P.C. at p. 162.

<sup>3</sup> *The Rising Sun* (1799), 2 C. Rob. 106; *The Hunter* (1815), 1 Dods. 487; *The Johanna Emilie* (1854), Spinks, 22.



has already been referred to,<sup>1</sup> the Russian Court, with no justification, included among such grounds the fact that the vessel only stopped after two blank shots were fired, that her cargo was received at an enemy port, that she sailed on an unusual course, and that she had carried contraband on a previous voyage.<sup>2</sup>

By the Declaration of London, the question of the circumstances is properly left to the decision of the Court.

If the vessel or the cargo is released without being taken before a prize court at all, the practice of nations has been conflicting. National courts in some cases have, and in others have not, jurisdiction to entertain a claim for compensation based upon the ground that the capture would, on inquiry, have proved unjustifiable. The rule was laid down in the terms stated above; but in the Report explaining the rule, it is pointed out that 'if the action of the belligerent has been confined to the capture, it is the law of the belligerent captor which decides whether there are tribunals competent to entertain a demand for compensation, and if so, what are those tribunals: the International Court has not, according to the Convention of the Hague, any jurisdiction in such a case. From an international point of view, the diplomatic channel is the only one available for making good such a claim, whether the cause for complaint is founded on a decision actually delivered, or on the absence of any tribunal having jurisdiction to entertain it.'

Release  
before  
adjudication.

There was some discussion as to whether the compensation should include what were called indirect damages, such as loss of business; and it was finally agreed that no rule should be laid down, the proposed International Prize Court being left to estimate the compensation at its discretion.

It may be repeated, in conclusion, that as the Declaration of London has not been ratified it does not possess, as such, binding force.<sup>3</sup> Accordingly, the customary law alone remains applicable, with which, however, the Declaration agrees in many respects. In these circumstances a belligerent is entitled to adopt, modify or reject any of the provisions of the Declaration (as the belligerents in the Great War have done), provided that such adoption, modification or rejection involves no inconsistency with the customary law, to the disadvantage of neutrals.<sup>4</sup>

The Declara-  
tion not  
ratified.

<sup>1</sup> See p. 341, *supra*.

<sup>2</sup> (1904), 1 R. & J. Pr. Cas. 1, at p. 16.

<sup>3</sup> Cf. *The Proton* (1916), 2 P.C. 107; *The Hakan* (1916), 2 P.C. 210; (1917), 2 P.C. 479; *The Louisiana* (1918), A.C. 461.

<sup>4</sup> See *supra*, p. 331.

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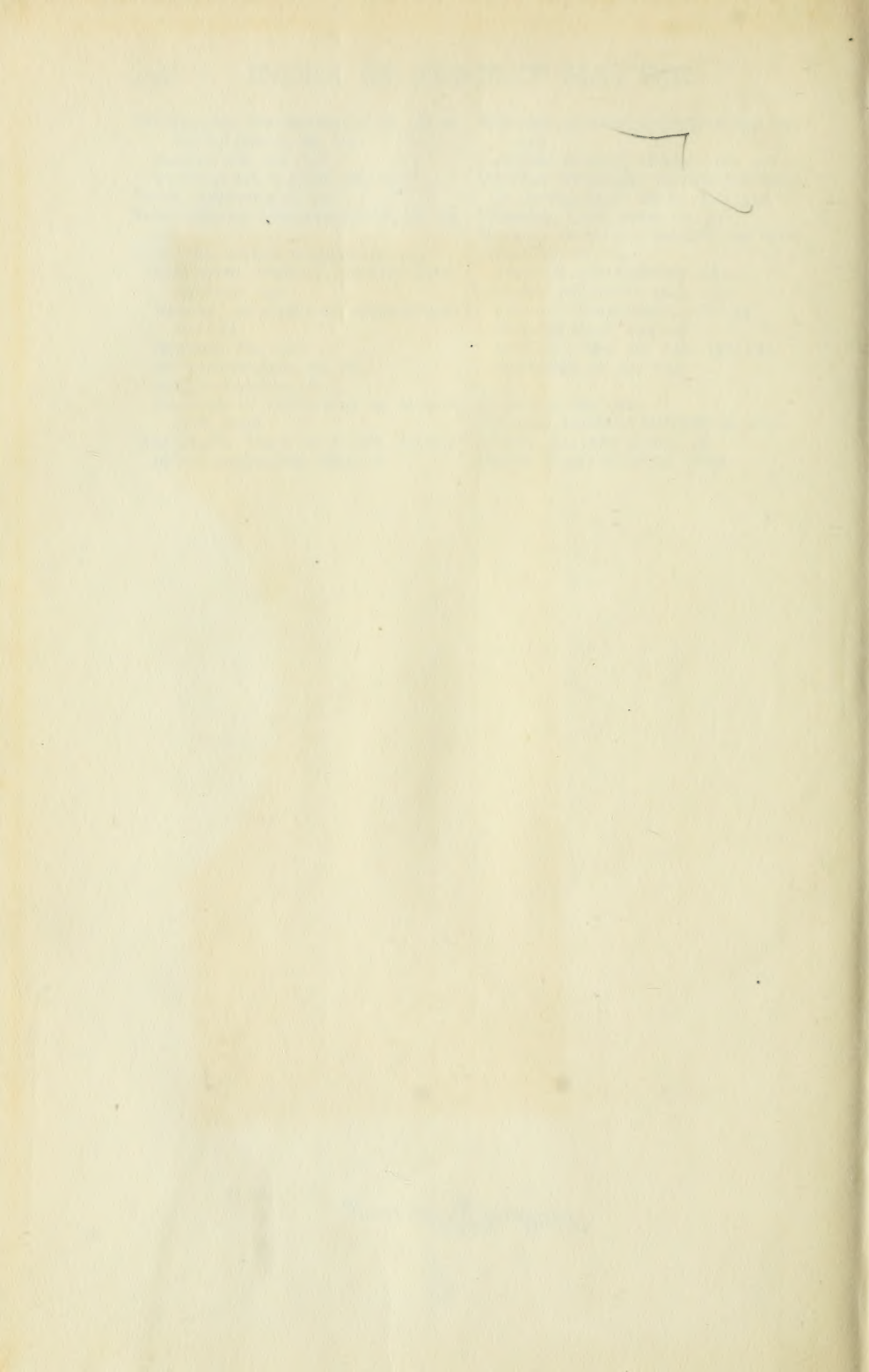
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